Customs Bulletin

Regulations, Rulings, Decisions, and Notices concerning Customs and related matters

and Decisions

of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

Vol. 20 MARCH 19, 1986 No. 11

This issue contains:

AVAILABILITY OF BOUND VOLUMES

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THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

NOTICE

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U.S. Customs Service

Treasury Decisions

(T.D. 86-55)

Customhouse Broker License—Suspension

Suspension of Customhouse Broker's License No. 5932

Effective upon publication date of this notice, pursuant to section 641, Tariff Act of 1930, as amended (19 U.S.C. 1641), and Part 111 of the Customs Regulations, as amended (19 CFR Part 111), the individual customhouse broker's license no. 5932 issued to Paul V. McCormack, for the Customs District of New York, New York is hereby suspended for a period of not less than four years. Pursuant to a negotiated settlement between the U.S. Customs Service and Paul V. McCormack, after the four year period has expired, Mr. McCormack may apply for reissuance of customhouse broker's license no. 5932.

Date: February 27, 1986.

ALFRED R. DEANGELUS,
Acting Commissioner of Customs.

[Published in the Federal Register, March 6, 1986 (51 FR 7872)]

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19 CFR Parts 141 and 152

(T.D. 86-56)

Entry of Merchandise Imported From Countries Imposing Export Restrictions

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of policy.

SUMMARY: In recent years, importers of merchandise from countries which impose minimum price requirements to obtain quota or permission to export have been importing such merchandise using documents procured from the government of the country of origin by means of fraud or false statements. The documents in question are usually "visaed invoices" (an invoice stamped with or otherwise recording export approval by an appropriate authority of the gov-

ernment of the country of origin), where the export approval was based on false (inflated or deflated) merchandise values supplied by the exporter and set forth on the invoice. The acceptance of these documents by Customs is inconsistent with the requirement, under the law and regulations, that the invoice set forth the purchase price of the merchandise, and is precluded by the regulations, which call for the rejection of any documents which appear, or are known, to be erroneous. Customs will adhere to the law and regulations.

EFFECTIVE DATE: The policy will become effective with respect to all merchandise entered or withdrawn from warehouse for consumption on or after May 5, 1986.

FOR FURTHER INFORMATION CONTACT: Bruce Shulman, Classification and Value Division, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202-566-2938).

SUPPLEMENTARY INFORMATION:

BACKGROUND

In recent years, certain importers of merchandise from countries which impose export restrictions on such merchandise (an export quota, for example) have gained export approval from the government of the country of origin by means which result in the presentation to Customs, upon the entry of the merchandise into the U.S., of documents—usually "visaed invoices"—which contain false statements. A "visaed invoice" is an invoice which is stamped with or otherwise signifies the export approval of the appropriate government authority in the country of origin but, in the situations in question, such approval is premised on false (inflated or deflated) merchandise values set forth in the invoice by the exporter.

For example, the exporter and the U.S. importer may agree on a unit price of $10 for merchandise which the government of the country of origin will not approve for export to the U.S. at a unit price of less than $20. To obtain export approval, therefore, the exporter prepares an invoice setting forth a unit price of $20 for the merchandise; the appropriate authority of the government of the country of origin, based on the invoice information, stamps the invoice or otherwise signifies its approval for the export of the merchandise to the U.S. This document is required to be presented to Customs upon the entry of the merchandise into the U.S. and becomes a part of the entry package.

In many instances, the importer—for duty purposes—will allege the existence of a lower selling price than that recorded on the invoice, offering other evidence of the actual selling price, including (1) a second invoice prepared by the exporter showing the actual selling price, and evidence of payment by the importer of the latter price; (2) evidence of receipt of a refund from the exporter in an amount of the difference between the invoice price and the actual

agreed-upon selling price; or (3) evidence that the "overpayment" to the exporter per the inflated invoice price has been used to create an artificially low price for other goods shipped to the importer (other merchandise not subject to the same export restrictions). Although many importers have revealed the actual purchase details to Customs (in order to avoid any overpayment of duty, to avoid a possible penalty assessment for presenting Customs with a document known to contain false information, or for other reasons), others may not have done so—electing instead to pay the additional duty and to accept the risk of penalties in an effort to facilitate the processing of the entry by Customs.

Section 484(a), Tariff Act of 1930, as amended (19 U.S.C. 1484(a)), requires that importers file with Customs documentation which, among other things, allows Customs "to assess properly the duties on the merchandise, [and] collect accurate statistics with respect to the merchandise * * *." Clearly, an invoice which sets forth a false purchase price does not satisfy this requirement. Equally clearly, such an invoice fails the requirement imposed by 19 U.S.C. 1481(a)(5), that each invoice of imported merchandise set forth "[t]he purchase price of each item * * *." These requirements are confirmed in the corresponding implementing regulations (*e.g.*, Sections 141.81, 141.83 and 141.86, Customs Regulations, 19 CFR 141.81, 141.83, and 141.86). Sections 141.61(e)(4) and 141.64, Customs Regulations (19 CFR 141.61(e)(4) and 141.64), provide that Customs shall not accept entry and entry summary documentation which clearly appears, or is known by Customs, to be erroneous.

ACTION

On or after the effective date of this document, any differences or inconsistencies in the information contained in documents presented to Customs in connection with the importation of merchandise shall be considered as an indication that one or more of such documents contains false or erroneous information. In such circumstances, the entry documentation will not be accepted by Customs but will instead be returned to the importer for correction.

In situations where the visaed invoice or document presented to Customs (and necessary for the entry of the merchandise) contains erroneous value or price information, such invoice or document can only be corrected by the presentation to Customs of a new, corrected invoice or document stamped with the visa of the government of the country of origin. Customs will not accept pro forma invoices in any case involving apparent differences in price or value information in the documents required to be submitted to Customs and which involve the production of a document which is required to contain a foreign country's visa.

Customs will fully investigate any suspected attempts to circumvent the foregoing policy, including unusual resales and the submission of other entry documentation corroborating the value or

price information set forth in a visa document and otherwise suspected to be false. In appropriate circumstances, Customs will initiate actions under the civil and criminal penalty statutes it administers, including but not limited to 19 U.S.C. 1592, 18 U.S.C. 542, and 18 U.S.C. 1001.

PREVIOUS CUSTOMS RULINGS

To the extent that any ruling previously issued by Customs including those discussing whether a transaction value exists in situations similar to those described above, may have indicated that entry documentation containing inconsistencies or differences in price or value information would be accepted by Customs (either because the ruling failed to address the acceptability of such documentation or otherwise), those rulings are hereby amended and modified to conform with the policy hereinabove set forth.

WILLIAM VON RAAB,
Commissioner of Customs.

Dated: February 20, 1986.
FRANCIS A. KEATING II,
Assistant Secretary of the Treasury.

[Published in the Federal Register, March 6, 1986 (51 FR 7783)]

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19 CFR Part 12

(T.D. 86-57)

Customs Regulations Amendment Relating to Textiles and Textile Products

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations relating to the importation of textiles and textile products into the U.S. Due to recent changes in the Tariff Schedules of the United States resulting from Presidential Proclamation 5365, dated August 30, 1985, effectuating the U.S.-Israel Free Trade Area agreement, certain general headnotes upon which portions of the Customs Regulations are predicated no longer exist. Accordingly, this document revises the Customs Regulations to reflect those changes.

EFFECTIVE DATE: March 11, 1986.

FOR FURTHER INFORMATION CONTACT: Legal Aspects: Phil Robins, Classification and Value Division (202-566-8181); Operational Aspects: Bill Marchi, Duty Assessment Division (202-566-2957); U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

SUPPLEMENTARY INFORMATION:

BACKGROUND

By T.D. 85–38, published in the Federal Register on March 5, 1985 (50 FR 8710), § 12.130, Customs Regulations (19 CFR 12.130), was amended to provide specific regulatory authority mandating that "country of origin" rules be applied in determining whether textiles or textile products are subject to any of the multilateral or bilateral textile agreements negotiated by the U.S. pursuant to § 204, Agricultural Act of 1956, as amended (7 U.S.C. 1854).

Section 12.130(a), Customs Regulations, now states that textiles or textile products subject to § 204, Agricultural Act of 1956, as amended (7 U.S.C. 1854), include merchandise subject to General Headnotes 3(g)(iii)(C)(1), 3(g)(iii)(C)(2), and 3(g)(iii)(E) of the Tariff Schedules of the United States (TSUS) (19 U.S.C. 1202). In addition, § 12.130(f), Customs Regulations, states that all importations of textiles and textile products covered by General Headnotes 3(g)(iii)(C)(2) or 3(g)(iii)(E), TSUS, shall be accompanied by the appropriate declaration(s) of the manufacturer, producer, exporter or importer of the textiles or textile products.

Pursuant to the U.S.-Israel Free Trade Area (FTA) agreement, which became effective September 1, 1985, certain changes were made to the TSUS; including the deletion of General Headnotes 3(g)(iii)(C)(1), 3(g)(iii)(C)(2), and 3(g)(iii)(E).

The FTA agreement is a program providing for free or reduced rates of duty for merchandise from Israel to stimulate trade between Israel and the U.S. This program was authorized by §§ 401–405 of the Trade and Tariff Act of 1984 (Pub. L. 98–573) and implemented by the U.S.-Israel Free Trade Area Implementation Act of 1985 (19 U.S.C. 2112 note) and Presidential Proclamation 5365 of August 30, 1985, published in the Federal Register on September 5, 1985 (50 FR 36220). On January 1, 1985, all currently eligible reduced rate importations from Israel will be accorded duty-free treatment.

The deletion of the above mentioned general headnotes from the TSUS necessitates their deletion from § 12.130. These are nonsubstantive changes which will merely conform the Customs Regulations to the TSUS.

EXECUTIVE ORDER 12291

This document does not meet the criteria for a "major rule" as specified in § 1(b) of E.O. 12291. Accordingly, no regulatory impact analysis has been prepared.

REGULATORY FLEXIBILITY ACT

Because no notice of proposed rulemaking is required for this final rule, the provisions of the Regulatory Flexibility Act (Pub. L. 96–354, 5 U.S.C. 601, *et seq.),* do not apply.

INAPPLICABILITY OF PUBLIC NOTICE AND DELAYED EFFECTIVE DATE PROVISIONS

Inasmuch as this amendment merely conforms the Customs Regulations to the TSUS, pursuant to 5 U.S.C. 553(b)(B), notice and public procedure thereon are unnecessary and pursuant to 5 U.S.C. 553(d)(3), a delayed effective date is not required.

DRAFTING INFORMATION

The principal author of the document was Glen E. Vereb, Regulations Control Branch, Office of Regulations and Rulings, Customs Headquarters. However, personnel from other Customs offices participated in its development.

LIST OF SUBJECTS IN 19 CFR PART 12

Customs duties and inspection, Imports, Textile products and apparel.

AMENDMENT TO THE REGULATIONS

Part 12, Customs Regulations (19 CFR Part 12), is amended as set forth below.

PART 12—SPECIAL CLASSES OF MERCHANDISE

1. The general authority citation for Part 12 continues to read as follows:

AUTHORITY: 5 U.S.C. 301, 19 U.S.C. 66, 1202 (Gen. Hdnote 11, Tariff Schedules of the United States), 1624. All other statutory authority cited at the end of various sections in Part 12 remains the same.

2. Paragraph (a) and the introductory text of paragraph (f) of § 12.130 are revised to read as follows:

§ 12.130 Textiles and textile products country of origin.

(a) *General.* Textiles or textile products subject to § 204, Agricultural Act of 1956, as amended (7 U.S.C. 1854), include merchandise which is classifiable under the provisions contained in Schedule 3, Subpart 6D of Schedule 6, Part 1 of Schedule 7, and Subparts 4A, 5D, 5E, 7B, 12C, and 13B of Schedule 7 of the Tariff Schedules of the United States (TSUS) (19 U.S.C. 1202); provided that such merchandise:

(1) is in chief value of cotton, wool, or man-made fibers, or any textile fibers subject to the terms of any textile trade agreement, or any combination thereof; or

(2) contains 50 percent or more by weight of cotton or man-made fibers, or any textile fibers subject to the terms of any textile trade agreement; or

(3) contains 17 percent or more by weight of wool; or

(4) if in chief value of textile fibers or textile materials, contains a blend of cotton, wool, or man-made fibers, or any textile fibers subject to the terms of any textile trade agreement, or any combination thereof, which fibers, in the aggregate amount to 50 percent or more by weight of all component fibers.

* * * * * * *

(f) *Declaration of manufacturer, producer, exporter, or importer of textiles and textile products.* All importations of textiles and textile products subject to § 204, Agricultural Act of 1956, as amended, shall be accompanied by the appropriate declaration(s) set forth in paragraph (f)(1) or (f)(2) of this section. Textiles or textile products subject to § 204 include that merchandise described in § 12.130(a). All importations of textiles and textile products not subject to § 204 shall be accompanied by the declaration set forth in paragraph (f)(3) of this section. The declaration(s) shall be filed with the entry. The declaration(s) may be prepared by the manufacturer, producer, exporter or importer of the textiles and textile products. If multiple manufacturers, producers, or exporters are involved, a separate declaration prepared by each may be filed. A separate declaration may be filed for each invoice which is presented with the entry. The determination of country of origin, other than as set forth in paragraph (g) of this section, will be based upon information contained in the declaration(s). The declaration(s) shall not be treated as a missing document for which a bond may be filed. Entry will be denied unless accompanied by a properly executed declaration(s).

* * * * * * *

WILLIAM VON RAAB,
Commissioner of Customs.

Approved: February 24, 1986.

FRANCIS A. KEATING II,
Assistant Secretary of the Treasury.

[Published in the Federal Register, March 11, 1986 (51 FR 8314)]

(T.D. 86–58)

Customs Broker's License—Revocation by Operation of Law of Customs Broker's License No. 5234

Pursuant to section 641, Tariff Act of 1930, as amended (19 U.S.C. 1641), notice is hereby given that Customs broker's license No. 5234 of Behring International, Inc., is revoked by operation of law.

WILLIAM VON RAAB,
Commissioner of Customs.

[Published in the Federal Register, March 11, 1986 (51 FR 8391)]

U.S. Customs Service

General Notice

Request for Comments Regarding Effective Date for Country-of-Origin Marking Requirement on Orange Juice Containers

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Solicitation of public comments and notice of public hearing.

SUMMARY: Customs is soliciting the views of the public regarding an implementation date for a requirement that labels on frozen concentrated and reconstituted orange juice products which contain imported concentrate be marked to show the foreign country-of-origin of the products. The requirement for marking the products was recently upheld by the Court of International Trade, but Customs was directed by the Court to seek comments from all interested parties before reaching a decision on an effective date for the requirement.

DATE: Comments (preferably in triplicate) must be received on or before April 10, 1986.

ADDRESS: Comments may be submitted to and inspected at the Regulations Control Branch, U.S. Customs Service, Room 2426, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202–566–8237).

FOR FURTHER INFORMATION CONTACT: Lorrie Rodbart, Entry Procedures and Penalties Division, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202–566–5765).

SUPPLEMENTARY INFORMATION:

Background

Customs is requesting the views of the public in regard to the earliest practicable implementation date for a requirement that containers of orange juice in frozen concentrated or reconstituted forms, which contain imported concentrate, must be labeled to comply with the country-of-origin marking requirements of § 304, Tariff Act of 1930, as amended (19 U.S.C. 1304).

In response to a formal request, Customs published a ruling dated September 4, 1985, in the CUSTOMS BULLETIN of September 25, 1985 (C.S.D. 85–47, 19 Cust. Bull. No. 39 at 21), stating that retail packages of orange juice containing imported concentrate must be marked. The rationale for that decision is discussed in detail in the cited decision. That ruling was to be implemented for affected products entered for consumption or withdrawn from warehouse on or after January 1, 1986.

That implementation date was extended to March 1, 1986, by a notice published in the December 11, 1985, CUSTOMS BULLETIN (19 Cust. Bull. No. 50). The extension decision took into account the ruling's perceived economic impact on the manufacturing public, as well as the right of ultimate purchasers of affected juice products to be fully informed about the origin of those products. The March 1, 1986, date was nearly 6 months after the initial ruling had been issued, and was considered reasonable.

In a recent case brought by the National Juice Products Association, *et al.* challenging C.S.D. 85–47, *National Juice Products Association* v. *United States,* —— CIT ——, Slip Op. 86–13 (January 30, 1986), the Court of International Trade held that C.S.D. 85–47 was substantively valid. The Court, however, remanded the case to Customs for reconsideration of the effective date. The Court directed Customs to adhere to the notice and comment provisions of § 177.10(c)(2), Customs Regulations (19 CFR 177.10(c)(2)), and to carefully consider all possible issues relating to a reasonable time to implement the new ruling.

Accordingly, Customs is soliciting comments related to the implementation date. Of particular interest is any information concerning the time it generally takes suppliers to provide new or changed labels and cans to the packagers of orange juice products, as well as the quantity of labels and printed retail containers usually kept in inventory. We also seek information as to whether the industry has already taken steps to procure new labels which satisfy the requirements of C.S.D. 85–47.

PUBLIC HEARING

A public hearing will be held on this matter on March 28, 1986, commencing at 9:30 a.m. in Room 3428, Customs Service Headquarters.

COMMENTS

Before making a determination on this matter, Customs will consider any written comments timely submitted. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), § 1.4, Treasury Department Regulations (31 CFR 1.4), and § 103.11(b), Customs Regulations (19 CFR 103.11(b)), between 9 a.m. and 4:30 p.m. on normal business days, at the Regulations Control Branch, Room 2426, U.S.

Customs Service Headquarters, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

DRAFTING INFORMATION

The principal author of this document was Larry L. Burton, Regulations Control Branch, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

WILLIAM VON RAAB,
Commissioner of Customs.

Approved: February 21, 1986.
DAVID D. QUEEN,
Assistant Secretary of the Treasury.

[Published in the Federal Register, March 11, 1986 (51 FR 8338)]

U.S. Court of Appeals for the Federal Circuit

(Appeal No. 86-560)

AMERICAN LAMB CO., ET AL., APPELLEES *v.* UNITED STATES, APPELLANT, AND NEW ZEALAND MEAT PRODUCTS BOARD, ET AL., INTERVENORS

Catherine R. Field, Office of the General Counsel, U.S. International Trade Commission, of Washington, D.C., argued for appellant. With her on the brief were *William E. Perry, Lyn M. Schlitt,* General Counsel and *Michael P. Mabile,* Assistant General Counsel.

Edward J. Farrell, Bronz & Farrell, of Washington, D.C., argued for intervenors, New Zealand Meat Products Board, et al.

Robert T. Wray, Robert Wray Associates, of Washington, D.C., argued for appellee.

N. David Palmeter, David P. Houlihan and *Alan H. Price,* Mudge Rose Guthrie Alexander & Ferdon, of Washington, D.C., were on the brief for Amicus Curiae Crystal International Corp., et al. *Victor T. Fuzak* and *Craig M. Indyke,* Hodgson, Russ, Andrews, Woods & Goodyear, of Buffalo, New York, of counsel.

Thomas B. Wilner, Sukhan Kim and Kimberly Till, Arnold & Porter, of Washington, D.C., were on the brief for Amicus Curiae Hankook Tire Mfg. Co., et al.

Italo H. Ablondi, F. David Foster, Sturgis M. Sobin and *Pamela A. McCarthy,* Ablondi & Foster, P.C., of Washington, D.C., were on the brief for Amicus Curiae Taiwan Electrical Appliance Manufacturers Association.

Ronald N. Isroff and *Morton L. Stone,* Ulmer, Berne, Laronge, Glickman & Curtis, of Cleveland, Ohio, were on the brief for Amicus Curiae Glaverbel S.A.

Appealed from: U.S. Court of International Trade.

Judge DICARLO.

(Appeal No. 86-560)

AMERICAN LAMB CO., ET AL., APPELLEES *v.* UNITED STATES, APPELLANT, AND NEW ZEALAND MEAT PRODUCTS BOARD, ET AL., INTERVENORS

(Decided February 28, 1986)

Before MARKEY, *Chief Judge,* BALDWIN, and NIES, *Circuit Judges.*

MARKEY, *Chief Judge.*

Interlocutory appeal from an order of the United States Court of International Trade, 611 F. Supp. 979 (Ct. Int'l Trade 1985), ordering the U.S. International Trade Commission (ITC) to reconsider a

preliminary determination issued in an antidumping duty investigation under section 733(a) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1673b(a) (1982). The court certified its order for immediate appeal. We remand with instructions to vacate the order.

BACKGROUND

On April 18, 1984, three domestic lamb producers, American Lamb Co., Denver Lamb Co., and Iowa Lamb Corp. (Denver Lamb), filed petitions with the ITC and the International Trade Administration of the U.S. Department of Commerce (ITA), alleging that imports of lamb meat from New Zealand are being subsidized and then sold in the United States at less than fair value (LTFV). Accordingly, ITC instituted preliminary countervailing and antidumping investigations under sections 703(a) and 733(a), respectively, of the Tariff Act of 1930, as amended, 19 U.S.C. §§ 1671b(a) and 1673b(a), to determine whether there is a reasonable indication that an industry in the United States is being materially injured, or is being threatened with material injury, or whether there is a reasonable indication that the establishment of an industry in the United States is being materially retarded, by reason of imports of such merchandise.

Notice of the initiation of ITC's investigation, and of a public conference to be held in connection with the investigation, was posted in the Office of ITC's Secretary and was published in the Federal Register on April 25, 1984. 49 Fed. Reg. 17,828 (1984). The conference was held on May 10, and all persons so requesting were permitted to appear in person or by counsel.

Denver Lamb presented the evidence disclosed in its petitions (declining production of live lambs, decreased prices, and increasing lamb and sheep slaughter). During its preliminary investigation, ITC also received information from the United States Department of Agriculture, packers and producers of lamb meat, academic and trade association researchers, and from intervenors New Zealand Meat Producers Board, Meat Export Development Company, and New Zealand Lamb Company.

Having weighed all the evidence, ITC determined on May 25, 1984 (by a 4–2 vote) that there is no reasonable indication that the domestic lamb industry is being materially injured, or being threatened with material injury, or that the establishment of an industry in the United States is being materially retarded, by reason of the importation of lamb meat from New Zealand. *Lamb Meat from New Zealand,* Investigations Nos. 701–TA–214 (Preliminary), and 731–TA–188 (Preliminary), U.S.I.T.C. Pub. No. 1534 (1984). Those determinations were published in the Federal Register. 49 Fed. Reg. 24,458 (June 13, 1984).

Denver Lamb sought review in the Court of International Trade of those negative preliminary determinations pursuant to 19 U.S.C. § 1516a(a)(1)(A)(iii), arguing that the action should be remanded be-

cause the ITC weighed conflicting evidence in making its determinations and because the weighing of conflicting evidence was contrary to the decisions of the court in *Republic Steel Corp.* v. *United States,* 591 F. Supp. 640 (1984), *reh'g denied,* 16 Cust. B. & Dec., No. 14, at 55 (Ct. Int'l Trade 1985), and *Jeannette Sheet Glass Corp.* v. *United States,* 607 F. Supp. 123 (Ct. Int'l Trade 1985).

ITC conceded that if those decisions are followed, the action should be remanded, but argued that the cases should not be followed because 19 U.S.C. § 1673b(a) authorizes ITC to weigh conflicting evidence in a preliminary investigation.

The court dismissed as moot the challenge to ITC's negative preliminary determination resulting from the countervailing duty investigation, No. 701-TA-214 (Preliminary), because, effective April 1, 1985, the Office of the U.S. Trade Representative terminated New Zealand "as a country" under Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade (GATT Subsidies Code). 50 Fed. Reg. 13,111 (April 2, 1985). Thus, New Zealand was no longer entitled to an injury test in countervailing duty investigations.[1] 611 F. Supp. at 980 n.1; *see* 19 U.S.C. § 1671, as amended by Trade and Tariff Act of 1984, Pub. L. No. 98-573, § 602(a), 98 Stat. 3024.[2]

Concerning the challenge to the antidumping duty determination, the court wrote:

> Defendant's arguments have been rejected three times within the year by two judges of this Court with broad experience in this complex area of the law. Under these circumstances, *stare decisis* counsels the Court to follow the prior decisions. Defendant should address its arguments to our appellate court.

611 F. Supp. at 981. The court remanded the action, in light of *Republic Steel* and *Jeannette Sheet Glass,* instructing ITC to reconsider the antidumping determination.

On July 19, 1985, the court certified its order allowing ITC to appeal to this court pursuant to 28 U.S.C. § 1292(d)(1). The trial court granted ITC's motion to stay proceedings until this court denied, or rendered a decision in, the appeal.

On October 15, 1985, this court granted ITC's petition to accept the interlocutory appeal. Briefs were filed by the parties, intervenors, and *amici,*[3] and oral argument was presented.

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[1] Denver Lamb filed a new countervailing duty petition with the ITA on March 26, 1985. *Lamb Meat from New Zealand: Initiation of Countervailing Duty Investigation,* 50 Fed. Reg. 15,949 (April 23, 1985). That matter is not before us.

[2] Because the preliminary determination at issue here is that under the antidumping laws and not that under the countervailing duty laws, this opinion deals with 19 U.S.C. § 1673b(a) and not with § 1671b(a). Because, however, the question before us deals with preliminary determinations of material injury or threat thereof, and because both sets of laws require those determinations and employ the phrase "reasonable indication", what is said here may be seen as applicable to preliminary determinations of injury under both sets of laws.

[3] Crystal International Corporation and Flachglas, A.G.; Taiwan Electrical Appliance Manufacturers Association; Glaverbel S.A.; Jeannette Sheet Glass Corp.; and Hankook Tire Manufacturing Co., Ltd., Hankook Tire American Corp., Kumho and Co., Inc., Kumho U.S.A., Inc., Hyosung Corp., and Hyosung America, Inc.

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ISSUE

Whether ITC's weighing of all evidence in applying the "reasonable indication" standard of 19 U.S.C. § 1673b(a) in a preliminary investigation is permissible.

OPINION

I. Introduction[4]

The important question before this court involves a statute so fundamental to the application of the United States antidumping laws that an introductory listing of implementing procedures appears appropriate. *See generally* Horlick, *Summary of Procedures Under the United States Antidumping and Countervailing Duty Laws,* 58 St. John's L. Rev. 828 (1984).

Normally, as in this case, proceedings are initiated when petitions are filed by interested parties on the same day with the ITC and ITA, § 1673a(b)(2), though ITA may self-initiate an investigation, 19 U.S.C. § 1673a(a); *see* 19 C.F.R. § 353.35 (1985).

A normal antidumping duty proceeding involves five stages:

(1) The ITA decides within twenty days of receiving a petition whether to initiate an investigation. 19 U.S.C. § 1673a(c); *see* 19 C.F.R. § 353.37(a) (1985). An investigation will be initiated if the petition alleges the necessary elements for imposition of a duty and is accompanied by information "reasonably available to the petitioner supporting the allegations." 19 U.S.C. § 1673a(c). ITA's self-initiated investigations are based on "information available to it." 19 U.S.C. § 1673a(a); *see United States* v. *Roses, Inc.,* 706 F.2d 1563, 1566 (Fed. Cir. 1983). If ITA finds a petition insufficient an investigation is not initiated, 19 U.S.C. § 1673a(c)(3), and any investigation initiated by ITC is terminated. 19 U.S.C. § 1673b(a).

(2) If ITA has not found the petition insufficient, ITC must preliminarily determine within 45 days of the filing of the petition "whether there is a reasonable indication" that a domestic industry is being materially injured or threatened with material injury. 19 U.S.C. § 1673b(a). ITC bases its preliminary determination on questionnaires sent to importers and domestic interests, public conferences, post conference briefs, and exhibits. If that determination be in the negative, ITC terminates the investigation. *Id.; see* 19 C.F.R. § 207.18.

(3) If ITC finds a reasonable indication of injury, ITA must preliminarily determine, within 160 days of the petition filing date (subject to extension of up to 210 days, 19 U.S.C. § 1673b(c)(1)), whether there is a "reasonable basis to believe or suspect" that the

[4] Several appeals docketed in this court have been stayed pending the outcome of this appeal. *Jeannette Sheet Glass, supra,* Nos. 85-2455/2554/2555/2589, 86-519/609/700 (Fed. Cir. June 7—Nov. 29, 1985); *American Grape Growers Alliance For Fair Trade* v. *United States,* 615 F. Supp. 603 (Ct. Int'l Trade), No. 85-2717 (Fed. Cir. Aug. 18, 1985); *Armstrong Rubber Co.* v. *United States,* 614 F. Supp. 1252 (Ct. Int'l Trade), No. 85-2707 (Fed. Cir. Aug. 26, 1985). In addition, several cases pending in the Court of International Trade will be directly affected by resolution of the question on appeal.

merchandise is being sold, or is likely to be sold, at LTFV. 19 U.S.C. § 1673b(b)(1); *see* 19 C.F.R. § 353.39. An affirmative preliminary LTFV determination results in suspension of liquidation of duties and in posting of bonds for the merchandise. 19 U.S.C. § 1673b(d)(1)–(2). A negative preliminary determination prevents imposition of those provisional remedies but does not terminate the investigation.

(4) Within 75 days of its preliminary determination (subject to extension of up to 135 days, 19 U.S.C. § 1673d(a)(2)), ITA makes a final determination respecting the sale of merchandise at LTFV. 19 U.S.C. § 1673d(a)(1). If that final determination is in the negative, the investigation is terminated. 19 U.S.C. § 1673d(c)(2).

(5) If ITA's final LTFV determination is in the affirmative, ITC makes its final determination of material injury. 19 U.S.C. § 1673d(b)(1).[5] That determination is based on technical and economic testimony given at a trial-like hearing. If ITC finally determines that no injury exists, the investigation is terminated. If ITC determines that injury exists, ITA issues an antidumping duty order. 19 U.S.C. § 1673d(c)(2).

Judicial review in the Court of International Trade is available of any negative preliminary determination (stages 1–3), 19 U.S.C. § 1516a(a)(1), and of any final determination (stages 4 and 5). 19 U.S.C. § 1516a(a)(2).

II. Court of International Trade Decisions

In making preliminary determinations of injury, and in applying the "reasonable indication" standard, ITC has been weighing conflicting evidence. It has, since its very first investigation under the 1974 Act, been determining that there is no "reasonable indication" of material injury or threat when: (1) There is clear and convincing evidence of the absence of such reasonable indication; and (2) the record shows it extremely unlikely that evidence of a "reasonable indication" would be developed in a final investigation. *Butadiene Acrylonitrile Rubber from Japan,* Inq. No. AA1921-Inq.-1, U.S.I.T.C. Pub. No. 727, at 5 (1975). It applied the same criteria in subsequent proceedings. *See, e.g., Low-Fuming Brazing Copper Wire and Rod from France, New Zealand and South Africa,* Inv. Nos. 701-TA-237 and 731-TA-247 (Preliminary), U.S.I.T.C. Pub. No. 1673 (1985); *Uncoated Free Sheet Offset Paper from Canada,* Inq. No. AA1921-Inq.-10, U.S.I.T.C. Pub. No. 869 (1978). It was that administrative procedure that was rejected by the court in *Republic Steel* and *Jeannette Sheet Glass.*

In *Republic Steel,* the court remanded to the ITC two determinations in countervailing duty investigations because ITC weighed

[5] If ITA's preliminary determination is in the affirmative, ITC's final determination must be made within 120 days of that ITA determination or within 45 days of ITA's final determination, whichever is later. 19 U.S.C. § 1673d(b)(2). If ITA's preliminary determination is negative, ITC's final determination must be made within 75 days of any affirmative final determination of ITA. 19 U.S.C. § 1673d(b)(3).

conflicting evidence in making a negative preliminary determination. The court wrote:

> The low threshold of the ITC's determination of whether there is a reasonable indication of injury is the unavoidable and logical consequence of the completely different nature of the two stages of the ITC's involvement in these proceedings. *The object of these determinations should have been simply to find whether there were any facts which raised the possibility of injury. The resolution or interpretation of conflicting facts should have been reserved for a possible final injury determination.*
>
> The fundamental point which the Court emphasizes is that the standard claimed by the ITC for its preliminary determination of reasonable indication of injury, is actually the proper standard for a final determination. If applied at this early stage it would create a serious imbalance in the operation of the law.

591 F. Supp. at 650 (emphasis in original).

The court in *Republic Steel* denied ITC's motion for reconsideration and reaffirmed its rule that "the weighing of conflicting evidence by the ITC cannot be done at the threshold without entirely distorting the operation of the law and impeding the legislative intention that investigations be commenced on the basis of possibilities." 16 Cust. B. & Dec., No. 14, at 56. The court continued:

> Even if the ITC is held to a standard which required them to have "clear and convincing" evidence that there is no possibility of injury, the operation of the law is being distorted.
>
> The right to a full investigation was not intended to depend on anything more than a reasonable showing by a petitioner from matters fairly within its capacity to know. It was not intended to depend on a pre-investigation of conflicting evidence.

Id. The court then gave its own set of guidelines as to when ITC could terminate the investigation at the preliminary stage:

> If the petition does not contain the evidence of injury which could reasonably be expected to be within petitioner's knowledge, or is false, or is in conflict on essential points with matters of public record, or does not state injury as a matter of law even if its contents are taken as true, then the ITC may properly conclude that there is no reasonable indication of injury and no need for further investigation.

Id.

Because a negative preliminary determination is overturned by the Court of International Trade only if found to have been "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 19 U.S.C. § 1516a(b)(1)(A), the court felt that if ITC weighed the evidence, its decision could never be reversed. 19 Cust. B. & Dec., No. 14, at 56. The court found it difficult to conceive that

Congress wanted ITC to have "an absolute veto power on the commencement of countervailing and antidumping investigations." *Id.*

In *Republic Steel,* ITC had considered whether injury was reasonably indicated by importations from individual countries. The court held that ITC must in a preliminary investigation consider the cumulative or combined effect of all competitive, subsidized, or allegedly subsidized importations of a particular product from all involved countries. The court held that its requirement for cumulation did not conflict with the requirement that importations from a particular country be the cause of injury, because that question could be determined in the final determination. 591 F. Supp. at 645. The court said those "potentially contradictory demands are reconciled by operating at different stages of the investigation." *Id.* at 646. The court thus distinguished ITC's preliminary and final determinations on the basis of the court's own requirement that importations be cumulated in the former and particularized in the latter, leading it to create the "possibility" standard.

The court gave these reasons for its focus on a "possibility" of injury:

> (1) The statute calls for a "reasonable indication" thus suggesting "only the barest clues or signs [are] needed to justify further inquiry." 591 F. Supp. at 646.
>
> (2) In discussing the reasonable indication standard, "the House Committee on Ways and Means stated that a reasonable indication will exist in 'each case in which the facts reasonably indicate that an industry in the United States could *possibly* be suffering material injury * * *.'" *Id.* (quoting House Rep. No. 317, 96th Cong., 1st Sess. 52 (1979)).
>
> (3) The Senate Committee on Finance noted that the ITC preliminary determination, together with the sufficiency determination of ITA, implemented the United States' obligations under GATT Subsidies Code. That legislative history "indicates that the ITC decision is primarily *part of the decision as to whether an investigation should be initiated,*" and thus "should display the same spirit of receptiveness to the initiation of investigations as the ITA sufficiency determination." 591 F. Supp. at 647 (emphasis in original).
>
> (4) The "limited purpose" of the preliminary injury determination is to "weed out those cases which were clearly without merit and which could not possibly deserve further investigation." *Id.*
>
> (5) ITC's preliminary determination is in the "midst of the receptive standard of the *preceding* determination and the relaxed standard of the *following* determination." *Id.* at 648 (emphasis in original). Therefore, "it is reasonable to view the first ITC determination as designed only to eliminate those matters in which there is nothing whatsoever deserving investigation." *Id.*

In *Jeannette Sheet Glass,* the court applied the *Republic Steel* rationale in antidumping investigations and remanded the action to ITC. The court wrote:

> Here, the Commission's preliminary injury determinations did not address the question of whether there is sufficient information in the record to raise the *possibility* of injury, but rather sought to definitively resolve the issues by weighing the conflicting evidence. Put another way, the Commission's "preliminary" determination, in effect, constituted a final determination predicated solely upon data submitted in the forty-five day period permitted at the preliminary stage.

607 F. Supp. at 129 (emphasis added). On at least two other occasions, the court adopted the analysis outlined in *Republic Steel* and remanded cases to ITC. *Armstrong Rubber Co.* v. *United States,* 614 F. Supp. 1252 (Ct. Int'l Trade 1985); *American Grape Growers Alliance* v. *United States,* 615 F. Supp. 603 (Ct. Int'l Trade 1985).

The court's concern is directed to ITC's consideration of any evidence that would negate the allegations or information in a petition. The court's interpretation would thus require an affirmative preliminary determination, and (assuming an ITA preliminary LTFV determination) a subsequent full investigation, whenever information accompanying a petition raises the mere "possibility" of material injury, regardless of any contrary evidence. The difficulty is two-fold: (1) The statutory standard, as the court recognized, is "reasonable indication", not "possibility"; and (2) the court's order that ITC must not weigh the evidence in conducting a preliminary injury investigation is not in accord with the intent of Congress.

III. Standard of Review

A reviewing court must accord substantial weight to an agency's interpretation of a statute it administers. *Zenith Radio Corp.* v. *United States,* 437 U.S. 443, 450–51 (1978); *Udall* v. *Tallman,* 380 U.S. 1, 85 (1964). Though a court may reject an agency interpretation that contravenes clearly discernible legislative intent, its role when that intent is not contravened is to determine whether the agency's interpretation is "sufficiently reasonable". *Federal Election Committee* v. *Democratic Senatorial Campaign Committee,* 454 U.S. 27, 39 (1981); *see Melamine Chemicals, Inc.* v. *United States,* 732 F.2d 924, 928 (Fed. Cir. 1984). The agency's interpretation need not be the only reasonable construction or the one the court would adopt had the question initially arisen in a judicial proceeding. *Chevron, U.S.A. Inc.,* v. *National Resources Defense Council,* 467 U.S. 837, 843 n.11, 104 S. Ct. 2778, 2782 n.11 (1984); *see Consumer Products Division, SCM Corp.* v. *Silver Reed America, Inc.,* 753 F.2d 1033, 1039 (Fed. Cir. 1985).

Applying those guidelines, we reject the court's imposition of the mere possibility standard. One writing on a clean slate might find the court's reasoning fully acceptable, but a "court does not simply

impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation." *Chevron, U.S.A., supra,* 467 U.S. at 843, 104 S. Ct. at 2782.

Since the enactment of the 1974 Act, ITC has consistently viewed the statutory "reasonable indication" standard as one requiring that it issue a negative determination, as above indicated, only when (1) the record as a whole contains clear and convincing evidence that there is no material injury or threat of such injury; and (2) no likelihood exists that contrary evidence will arise in a final investigation. That view, involving a process of weighing the evidence but under guidelines requiring clear and convincing evidence of "*no* reasonable indication", and no likelihood of later contrary evidence, provides fully adequate protection against unwarranted terminations. Indeed, those guidelines weight the scales in favor of affirmative and against negative determinations. Under the appropriate standard of judicial review, ITC's longstanding practice must be viewed as permissible within the statutory framework.

IV. "Reasonable Indication" v. "Mere Possibility"

We are unable to join the court in its view that the statutory phrase "reasonable indication" means the same as a mere "possibility", or that it suggests "only the barest clues or signs needed to justify further inquiry." The statute calls for a reasonable indication of injury, not a reasonable indication of need for further inquiry. Moreover, ITC's use of "extremely unlikely" in considering need for further inquiry would appear to meet the court's concern for premature dismissal of that need.

The single sentence quoted by the court from the House Report cannot serve to substitute "possibility" for "reasonable indication" in the statute. Though the word "possibly" appears in that sentence, it follows the words "facts reasonably indicate", implying the need to determine facts and the exercise of reason.

Nor do we find in the statute a requirement for grouping ITC's preliminary determination with ITA's sufficiency determination. The statute establishes the five stages above described, each independent of the others and each with its distinct focus and purpose. Moreover, such grouping would not convert "reasonable indication" to "possibility" or require ITC to look only at the petition and its accompanying information. This court has determined that, when ITA determines the sufficiency of the petition, "Congress intended the *application of agency expertise,* not only to examine the petition and supporting data for internal inconsistencies, but also to evaluate it in light of a wide body of other information, to the end that, so far as possible, the commencement of unwarranted investigations should be avoided." *United States* v. *Roses Inc., supra,* 706 F.2d at 1569 (emphasis supplied).

ITC would not be able to fulfill what the court described as the "limited purpose" of weeding out "those cases which were clearly

without merit" if it must proceed to a final determination whenever it finds a mere "possibility" of injury in the petition and accompanying information. Virtually every petitioner can be expected to submit allegations and information sufficient to show *some* "possibility" of injury.

V. Congressional Intent

ITC's weighing of evidence in complying with § 1673b(a) is in full accord with the intent of Congress.

We begin with the best source of congressional intent, the statute:

> Except in the case of a petition dismissed by the administering authority under section 1673a(c)(3) of this title, the Commission, within 45 days after the date on which a petition is filed under section 1673a(b) of this title or on which it receives notice from the administering authority of an investigation commenced under section 1673a(a) of this title, shall make a determination, *based upon the best information available to it at the time of the determination, of whether there is a reasonable indication* that—
>
> (1) an industry in the United States—
>
> (A) is materially injured, or
>
> (B) is threatened with material injury, or
>
> (2) the establishment of an industry in the United States is materially retarded,
>
> by reason of imports of the merchandise which is the subject of the investigation by the administering authority. If that determination is negative, the investigation shall be terminated.

19 U.S.C. § 1673b(a) (emphasis supplied).

The legislative history supports the statutory statement that ITC should use "the best information available" in applying the "reasonable indication" standard. Congress introduced that standard when it added § 201(c)(2) to the Antidumping Act of 1921, Ch. 14, § 201, 42 Stat. 9, 11 (1921), in the Trade Act of 1974, Pub. L. No. 93-618, § 321(a)(2), 88 Stat. 1978, 2043-44 (1974) (1974 Act). When Congress repealed the Antidumping Act of 1921 in the Trade Agreements Act of 1979, Pub. L. No. 96-39, § 106(a), 93 Stat. 144, 193 (1979) (1979 Act), it adopted the "reasonable indication" standard for countervailing and antidumping preliminary determinations. 19 U.S.C. §§ 1671b(a), 1673b(a). Congress intended that the Commission apply the standard "in essentially the same manner" as it applied the standard under the 1974 Act. S. Rep. No. 249, 96th Cong., 1st Sess. 66, *reprinted in* 1979 U.S. Code Cong. & Ad. News 449, 452.

The purpose of a preliminary injury determination is to "eliminate unnecessary and costly investigations which are an administrative burden and an impediment to trade." S. Rep. No. 1298, 93rd Cong., 2d Sess. 171, *reprinted in* 1974 U.S. Code Cong. & Ad. News, 7186, 7308. When the procedure was adopted in the 1979 Act, the

law became "more clearly consistent with the international agreement which permits the imposition of provisional measures, that is, suspension of liquidation and the posting of a cash deposit, bond or other security on each entry subject to the suspension, only after an affirmative preliminary determination has been made that there are sales at less than fair value and that sufficient evidence of material injury has been presented." H.R. Rep. No. 317, 96th Cong., 1st Sess. 60–61 (1979).

In *Budd Co. Railway Division* v. *United States,* 507 F. Supp. 997, 1000 (Ct. Int'l Trade 1980), the court correctly noted that in requiring that ITC's preliminary determination be based on the "best information available to it," *see* 19 U.S.C. §1677e(b); 19 C.F.R. §207.17, "Congress has prescribed a thorough investigation by the Commission prior to the making of its preliminary determination." The same view is expressed in the House Report:

> The time limit provided in the bill for an ITC preliminary determination, although longer than that under present law, is still quite brief. It is therefore intended that the ITC will investigate the allegations in the petition *in as thorough a manner as possible using the information available within that time period, and will provide interested parties a reasonable opportunity to present their views.* Such opportunity does not ncessarily include a hearing such as that required prior to a final determination.

H.R. Rep. No. 317, *supra,* at 61 (emphasis supplied); *see also* S. Rep. No. 249, *supra,* at 66, *reprinted in* 1979 U.S. Code & Cong. & Ad. News, at 452.

In *Budd Co.,* the court noted that the Congressional mandate to conduct a thorough investigation based upon the best information available

> does not limit "the best information available" to that furnished by the petitioner or by any party-in-interest to the proceedings. The term "available" as used in the statute must be construed in accordance with its common meaning. In so doing, it is clear that all information that is "accessible or may be obtained," from whatever its source may be, must be reasonably sought by the Commission. It is only in this manner that the Commission can comply with the intended congressional mandate to conduct a "thorough investigation."

507 F. Supp. at 1003–04 (footnote omitted). The court in *Budd Co.* also indicated that the "affirmative obligation and duty of the Commission to conduct a 'thorough investigation' is not relieved" by a petition accompanied by information reasonably available to the petitioner supporting the allegations in the petition. *Id.* at 1001. Clearly, ITC cannot conduct a "thorough investigation" if it is permitted to review only such evidence as might support a petition.

Although a hearing is not required in a preliminary determination proceeding, ITC often includes, as it did here, a public confer-

ence "at which interested parties may present their views without the opportunity for cross-examination." *Budd Co. Railway Division, supra,* 507 F. Supp. at 1001; *see* Horlick, *supra,* 58 St. John's L. Rev. at 829–30. If ITC were precluded from all weighing of evidence, i.e., if it were required to disregard all evidence tending to disprove the allegations in a petition, there would be neither reason nor incentive for parties other than petitioners to present their views.

A series of factors—Congress' requirement that ITC conduct a thorough investigation, using the best information available to it, Congress' expectation of opportunity for interested parties to present their views, and Congress' provision of the "reasonable indication" standard for use in investigations initiated in response to a petition and in ITC's self-initiated investigations—all militate against a view that Congress intended ITC to disregard evidence that clearly and convincingly refutes the allegations in a petition. Stated another way, the notion that allegations in a petition found unsupportable because of overwhelming contradictory evidence should nonetheless result in a full investigation and potential imposition of provisional remedies is directly contrary to Congress' intent, as above indicated, of eliminating "unnecessary and costly investigations" and the "impediment to trade" that would reside in an unwarranted imposition of provisional remedies. Considering and weighing, under ITC's guidelines, all evidence gathered within the 45 days available for conducting a preliminary investigation, on the other hand, effectuates that legislative intent.

VI. Judicial Reviewability

Lastly, it should be remembered that ITC's negative preliminary determinations are reviewable in the Court of International Trade. 19 U.S.C. § 1516a(a)(1)(A)(iii). Whether the court might find it more difficult to overturn a negative preliminary determination when ITC had weighed conflicting evidence cannot be a factor in evaluating the premissibility of ITC's method of determining the presence or absence of a "reasonable indication" of injury or threat of injury. If ITC's negative determination, however reached, was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law", 19 U.S.C. § 1516a(b)(1)(A), the court should overturn it. If ITC's negative determination cannot be held defective on any of those grounds, the court should not overturn it.

Indeed, that Congress intended application of a narrow judicial review standard is made clear in its assertion that "traditional administrative law principles" be applied when reviewing preliminary determinations in which it "has entrusted the decision-making authority in a specialized, complex economic situation to [ITA and ITC]. Thus, review * * * would be to ascertain whether there was a rational basis in fact for the determination * * * ."

S. Rep. No. 249, *supra*, at 252, *reprinted in* 1979 U.S. Code Cong. & Ad. News at 638.

CONCLUSION

ITC's method of proceeding in applying the statutory reasonable indication standard does not contravene but accords with clearly discernible legislative intent and is sufficiently reasonable. To the extent that *Republic Steel* and its progeny suggest otherwise, those decisions cannot stand. Accordingly the case is remanded to the Court of International Trade with instructions to vacate the certified order.

REMANDED WITH INSTRUCTIONS TO VACATE

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Edward D. Re

Judges

Paul P. Rao
Morgan Ford
James L. Watson
Gregory W. Carman
Jane A. Restani
Dominick L. DiCarlo
Thomas J. Aquilino, Jr.

Senior Judges

Frederick Landis

Herbert N. Maletz

Bernard Newman

Samuel M. Rosenstein

Nils A. Boe

Clerk

Joseph E. Lombardi

150-147 O-86--3

Decisions of the United States Court of International Trade

(Slip Op. 86–17)

THE TIMKEN CO., PLAINTIFF *v.* UNITED STATES, MALCOLM BALDRIGE, SECRETARY OF COMMERCE, LIONEL H. OLMER, UNDER-SECRETARY FOR INTERNATIONAL TRADE ADMINISTRATION, U.S. DEPARTMENT OF COMMERCE, LARRY BRADY, ASSISTANT SECRETARY FOR INTERNATIONAL TRADE ADMINISTRATION, U.S. DEPARTMENT OF COMMERCE, GARY N. HORLICK, DEPUTY ASSISTANT SECRETARY FOR IMPORT ADMINISTRATION, U.S. DEPARTMENT OF COMMERCE, LEONARD M. SHAMBON, DIRECTOR, OFFICE OF COMPLIANCE, INTERNATIONAL TRADE ADMINISTRATION, U.S. DEPARTMENT OF COMMERCE, JOHN KUGELMAN, DIRECTOR, ANTIDUMPING ORDER COMPLIANCE DIVISION, INTERNATIONAL TRADE ADMINISTRATION, U.S. DEPARTMENT OF COMMERCE, J. LINNEA BUCHER, COMPLIANCE OFFICER, ANTIDUMPING ORDER COMPLIANCE DIVISION, INTERNATIONAL TRADE ADMINISTRATION, U.S. DEPARTMENT OF COMMERCE, DEFENDANTS, AND NTN BEARING CORP. OF AMERICA, INTERVENOR

Court No. 82-6-00890

Before MALETZ, *Senior Judge.*

(Dated February 20, 1986)

ON MOTIONS FOR JUDGMENT ON THE AGENCY RECORD AND FOR REMAND

Stewart and Stewart (Eugene L. Stewart, Terence P. Stewart, and *James R. Cannon, Jr.,* on the briefs) for plaintiff.

Richard K. Willard, Assistant Attorney General, *David M. Cohen,* Director, Department of Justice, Civil Division, Commercial Litigation Branch *(Velta A. Melnbrencis* on the briefs), for defendants.

Barnes, Richardson & Colburn (James H. Lundquist, Robert E. Burke, Donald J. Unger, and *Thomas M. Keating* on the briefs), for intervenor.

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Opinion and Order

Maletz, *Senior Judge:* In 1982, the International Trade Administration (ITA) of the Department of Commerce issued a final determination revoking a dumping finding on tapered roller bearings and component parts (TRBs) made in Japan by NTN Toyo Bearing Company (NTN) and distributed by NTN's subsidiary, NTN Bearing Corporation of America (NBCA). Plaintiff, The Timken Company (Timken), an American manufacturer of TRBs, commenced the present action challenging the ITA determination. Upon the government's motion, unopposed by Timken, the court, over intervenor NBCA's opposition, remanded several issues for further consideration by the ITA. The ITA's recalculation upon remand revealed only *de minimis* dumping margins. Presently before the court are two motions by Timken pursuant to rule 56.1 of this court seeking reversal of the agency revocation decision and remand for further proceedings. The government for its part agrees that partial remand is appropriate; NBCA, on the other hand, seeks affirmance of the ITA revocation determination. For the reasons set forth below, the court again remands this action to the ITA for (1) collection and review of data up to the date of its tentative determination; (2) collection and review of additional home market sales data for the period of time already reviewed by the ITA, and for reassessment of proper TRB model comparisons; (3) review of the accuracy of all pertinent NTN production costs; (4) correction of all errors that may have occurred below; and (5) recalculation of dumping margins and rescission of the partial revocation of the dumping finding, if warranted.

I. *Background*

The dumping finding in question had been published by the United States Treasury Department on August 18, 1976. 41 Fed. Reg. 34,974. On November 14, 1979, Treasury published a notice of a tentative determination to modify or revoke the finding. 44 Fed. Reg. 65,690. That tentative determination was largely based upon

information supplied to the Customs Service to the effect that there had been no sales at less than fair value between April 1, 1974 and March 31, 1978 of TRBs manufactured by NTN and sold by NBCA. *See id.* However, before Treasury had an opportunity to make a final determination regarding modification or revocation of the dumping finding, administration of the antidumping law was transferred from the Secretary of the Treasury to the Secretary of Commerce. Reorg. Plan No. 3 of 1979, § 5(a)(1)(C), 44 Fed. Reg. 69,273, *reprinted in* 19 U.S.C. at 963–64 (1982), *and in* 93 Stat. 1381, effective January 2, 1980, as provided by § 1–107(a) of Exec. Order No. 12,188, 45 Fed. Reg. 989, 993 (1980), *reprinted in* 19 U.S.C. at 968 (1982). Additionally, the Trade Agreements Act of 1979, which became effective on January 1, 1980, repealed the Antidumping Act of 1921 and replaced it with a new antidumping law. Trade Agreements Act of 1979, Pub. L. No. 96–39, tit. 1, § 106(a), 93 Stat. 144, 193.

Following transfer of administration of Commerce, the ITA conducted reviews of outstanding dumping findings pursuant to the annual review requirement of the Trade Agreements Act of 1979. *See* 19 U.S.C. § 1675 (1982), *amended by* 19 U.S.C.A. § 1675 (West Supp. 1985). During review of the Treasury dumping finding on TRBs from Japan, the ITA reviewed production and sale of TRBs by NTN and NBCA for the period April 1, 1978 through November 14, 1979. On February 27, 1981, the ITA published a notice of preliminary results of administrative review and tentative determination to revoke in part the dumping finding, 46 Fed. Reg. 14,371, and on June 15, 1982, it published a final determination revoking the outstanding dumping finding insofar as it pertained to TRBs produced and sold by NTN and NBCA, 47 Fed. Reg. 25,757. Timken challenged this final determination by commencing the present action on June 25, 1982.

In the course of this action, the government itself moved to remand the case to the ITA for recalculation of dumping margins. In support of this motion, which was agreed to by Timken and opposed by NBCA, the government advised the court that the ITA had taken the position that its method of calculating dumping margins had not been in accordance with its normal practice and was probably not in accordance with the applicable law and regulations. The court granted the motion for remand. *Timken Co.* v. *United States*, 7 CIT —, Slip Op. 84–63 (June 5, 1984). Thereafter, the government and Timken stipulated as to an order of remand, which was entered on June 26, 1984. Among other things, that order directed the ITA to recalculate dumping margins (1) using actual selling prices to the United States, (2) deducting an amount for United States import duties based on actual United States price, (3) weight-averaging home market prices on a monthly basis, and (4) using currency conversion factors applicable specifically to the date of exportation of the imported merchandise.

On February 5, 1985, the ITA submitted to the court the final results of its recalculation, which included a finding that the weighted-average dumping margin was 0.33%. Since the ITA considered this recomputed dumping margin to be *de minimis,* it did not rescind its partial revocation of the dumping finding.

Now before the court are two motions by Timken for partial judgment on the agency record. Timken's first motion requests that the case be remanded so that the ITA may (1) obtain from NTN a complete listing of its home market sales of TRBs during the period under investigation; (2) itself select from among NTN's home market sales the most appropriate "similar" merchandise for comparison with TRBs exported to the United States; (3) investigate and verify NTN's production cost figures for the period prior to March 21, 1978; (4) investigate and verify NTN's claimed adjustments for differences in merchandise; and (5) reject any partial submissions by NTN in response to investigation of the areas just identified and instead use the best information otherwise available.

Timken's second motion for partial judgment on the agency record alleges that the ITA erred in (1) revoking the antidumping duty order on the basis of an analysis of only a 19-month rather that a two-year period; (2) failing to deduct from exporter's sales price (ESP) an amount for reasonable profits; (3) adjusting foreign market value for certain advertising expenses and inland freight costs; (4) failing to investigate issues raised in a market-research report submitted by Timken; (5) deducting indirect selling expenses from foreign market value ("ESP offset"); (6) making deductions for differences in circumstances of sale in alleged contravention of a statutory requirement that there be a casual relationship between claimed differences in circumstances of sale and differences in value; and (7) failing to deduct from ESP selling expenses properly allocable to United States sales. Given these allegations of error, Timken seeks, in its second motion, a remand for recalculation of dumping margins, and reversal of the ITA's revocation of the dumping finding.

Supplementing its two motions for partial judgment, Timken has failed a brief arguing that the action should be remanded to the ITA on the additional ground that further review is required in light of the recent decision of the Court of Appeals for the Federal Circuit in *Freeport Minerals Co.* v. *United States,* 776 F.2d 1029 (Fed. Cir. 1985).

The government disputes a number of the claims made by Timken, but agrees that the action should be remanded to the ITA a second time so that the agency may (1) determine NTN prices for all TRBs sold in the home market during the relevant time period; (2) consider whether the proper TRB models were compared; (3) review the accuracy of all pertinent NTN production costs; (4) decide whether adjustments of foreign market value for advertising expenses and inland freight costs were justified; and (5) recalculate

dumping margins and rescind the partial revocation of the dumping finding, if appropriate.

NBCA opposes Timken's and the ITA's request for remand, contending, among other things, that the methods used by the ITA were lawful and that the final revocation determination was based on substantial evidence.

II. *Res Judicata*

NBCA also contends that a remand for reconsideration of the ITA determination is barred by the doctrine of administrative res judicata. The court does not agree. As the court noted in its decision ordering the first remand in this action, the law is clear that a remand is appropriate where an agency followed an improper method in making a determination or where there is a defect in the agency's findings. *See Timken Co.* v. *United States,* 7 CIT 2 ——, Slip Op. 84-63 (June 5, 1984); *Ford Motor Co.* v. *NLRB,* 305 U.S. 364, 372-76 (1939). It is true that res judicata principles may apply to administrative proceedings. *See United States* v. *Utah Construction & Mining Co.,* 384 U.S. 394, 421-22 (1966). However, administrative agency orders do not have the force and effect of law unless they have been "unequivocally affirmed by a court of law." *MGPC, Inc.* v. *Department of Energy,* 763 F.2d 422, 429 (Temp. Emer. Ct. App.), *cert. denied,* —— U.S. ——, 106 S. Ct. 76 (1985); *see Taunton Municipal Lighting Plant* v. *Department of Energy,* 669 F.2d 710, 715 (Temp. Emer. Ct. App. 1982). Prior to such affirmation, "[a]n agency, like a court, can undo what is wrongfully done by virtue of its order," *United Gas Improvement Co.* v. *Callery Properties, Inc.,* 382 U.S. 223, 229 (1965) (Federal Power Commission could order payment of refunds of excess monies collected under FPC order that had not become final and that had been overturned by a reviewing court); *Iowa Power & Light Co.* v. *United States,* 712 F.2d 1292, 1296-97 (8th Cir. 1983), *cert. denied,* 466 U.S. 949 (1984). Therefore, the ITA may reconsider its determinations when error taints the proceedings. *Melamine Chemicals, Inc.* v. *United States,* 8 CIT ——, ——, 592 F. Supp. 1338, 1339-40 (1984).

III. *Agency Failure to Collect Necessary Data*

A. *The Impact of Freeport Minerals*

Timken requests that this action be remanded for further review in light of the recent decision in *Freeport Minerals Co.* v. *United States,* 776 F.2d 1029 (Fed. Cir. 1985). Both the government and NBCA oppose that request.[1]

[1] The issue of the applicability of the decision in *Freeport Minerals* to this action was not raised in Timken's complaint, which predated the decisions of this court and of the appellate court in that case. However, the parties have fully briefed the issue, and court finds that the issue has been considered with the implied consent of all parties. Consequently, amendment of the complaint is not required. U.S. Ct. Int'l Trade rule 15(c) (issues not raised by the pleadings that are tried by the express or implied consent of the parties shall be treated in all respects as if they had been raised in the pleadings); *cf. id.* rule 15(a) (leave to amend the pleadings shall be freely given when justice so requires).

In *Freeport Minerals,* the court found that the ITA had abused its discretion in refusing a domestic party's request for collection of data for a period of time extending up to the date of the agency's tentative determination to revoke an antidumping order. The facts of *Freeport Minerals* and of this action are similar in many respects. In both cases the ITA inherited an action from the Treasury Department after Treasury had issued a tentative determination revoking an antidumping order, and then conducted a further review pursuant to the annual review requirement of section 751 of the Tariff Act of 1930, *as amended by* the Trade Agreements Act of 1979, 19 U.S.C. § 1675 (1982), *amended by* 19 U.S.C.A. § 1675 (West Supp. 1985). Also in both cases, over a year had elapsed between the end of the period that was actually reviewed by the ITA and the date of the ITA's own tentative determination to revoke. Thus, in the present case, the ITA reviewed data only for a period extending to the time of *Treasury's* tentative determination, November 14, 1979. Despite this, the ITA's own tentative determination was not issued until February 27, 1981, approximately 16 months later, 46 Fed. Reg. 14,371; and its final determination was not issued until June 15, 1982, approximately two and one-half years after the end of the period that the ITA had reviewed, 47 Fed. Reg. 25,757. In contradistinction to the facts of *Freeport Minerals,* however, the domestic party in this action, Timken, did not request that the ITA obtain and review data updated to the time of the agency's tentative determination, although Timken now requests a remand for such review. Two questions are therefore before the court: (1) whether, under the reasoning of *Freeport Minerals,* the ITA abused its discretion in failing to review data updated to the time of its own tentative determination notwithstanding the absence of a request by a domestic party that it obtain such data, and (2) if so, whether the court should nonetheless decline to remand on the basis of *Freeport Minerals,* in view of Timken's failure to raise the issue below.

The Court of Appeals in *Freeport Minerals* held specifically that the ITA's refusal to comply with a domestic party's request for information updated to the time of the agency's preliminary determination placed an impermissible burden of proof upon the domestic party "contrary to the policies underlying the applicable statute and regulations," *id.* at 1033, and thus constituted an abuse of discretion. *Id.* at 1033–34. The ITA's failure here to obtain data updated to the time of its preliminary determination similarly constituted an abuse of discretion, despite the absence of a request for such data. That failure was equally contrary to the policies underlying the statutory and regulatory directives relied upon in *Freeport Minerals.*

The grant of discretionary authority to an agency "implies that the exercise of discretion be predicated upon a judgment anchored in the language and spirit of the relevant statutes and regula-

tions." *Id.* at 1032. As stated in *Freeport Minerals,* the legislative history indicates a congressional intent that the administering agency, in reviews conducted under the 1979 Trade Agreements Act, "*always* use the most up-to-date information available." *Id.* (emphasis added); H.R. Rep. No. 317, 96th Cong., 1st Sess. 77 (1979) (H.R. Rep. No. 317).

The burden of ensuring such up-to-date review should not rest upon a domestic party. Antidumping proceedings are investigatory, not adjudicatory. H.R. Rep. No. 317 at 77; *see Sacilor, Acieries et Laminoirs de Lorraine* v. *United States,* 3 CIT 191, 195, 542 F. Supp. 1020, 1025 (1982). The responsibility for making findings pursuant to section 1675 rests upon the ITA. *Freeport Minerals,* 776 F. 2d at 1032. Thus, a request by a domestic party is not a precondition of the ITA's obligation to obtain updated information.

The government notes, though, that section 1675 was amended in October 1984, and that reviews under that section are now mandated only if a *request* for review has been received by the ITA. 19 U.S.C. § 1675(a)(1) (1982), *as amended,* 19 U.S.C.A. § 1675(a)(1) (West Supp. 1985). The purpose of the amendment was to reduce the burden on the ITA "of automatically reviewing every outstanding order even though circumstances do not warrant it or parties to the case are satisfied with the existing order." H.R. Rep. No. 725, 98th Cong., 2d Sess. 22-23 (1984). However, that amendment was enacted several years after the ITA preliminary determination in this action. Whether the ITA abused its discretion is a determination that must be made not in light of the amendment, but in light of the law existing at the time of the alleged abuse. In sum, the court holds that the ITA abused its discretion in reaching a determination based on stale data.

1. Exhaustion—Freeport Minerals

Given the ITA's abuse of discretion in relying on stale data, the question remains as to whether the court should remand for further review in light of *Freeport Minerals* despite Timken's failure to exhaust its administrative remedies on this issue. "[A]s a general rule * * * courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice." *United States* v. *L.A. Tucker Truck Lines, Inc.,* 344 U.S. 33, 37 (1952). However, unless exhaustion of administrative remedies is mandated by statute, application of the exhaustion doctrine is within the discretion of the court. *SEC* v. *G.C. George Securities, Inc.,* 637 F.2d 685, 688 n.4 (9th Cir. 1981); *Association of National Advertisers, Inc.* v. *FTC,* 627 F.2d 1151, 1157 (D.C. Cir. 1979) (jurisprudential considerations such as the exhaustion doctrine do not bear on whether court has jurisdiction but only on whether it

should exercise that jurisdiction), *cert. denied,* 447 U.S. 921 (1980).[2] Like most other judicial doctrines, the doctrine of exhaustion is subject to numerous exceptions. *McKart* v. *United States,* 395 U.S. 185, 193 (1969); *see Reid* v. *Engen,* 765 F.2d 1457, 1460–61 (9th Cir. 1985). The doctrine "should not be applied where the obvious result would be a plain miscarriage of justice." *Hormel* v. *Helvering,* 312 U.S. 552, 558 (1941).

Among the exceptional cases are "those in which there have been judicial interpretations of existing law after decision below and pending appeal—interpretations which if applied might have materially altered the result." *Id.* at 558–59 (footnote omitted); *see Philipp Brothers, Inc.* v. *United States,* 10 CIT ——, ——, Slip Op. 86–16, at 5–9 (Feb. 14, 1986); *Rhone Poulenc, S.A.* v. *United States,* 7 CIT ——, ——, 583 F. Supp. 607, 610 (1984). This is such a case. The interpretation of existing law set forth in *Freeport Minerals,* if applied in this action, could have a substantial impact upon the ITA's determination, since it would require review of data for an additional 16 months. Moreover, certain of the policies underlying the doctrine of exhaustion are not applicable to the present issue. For one thing, the question of what time period should have been reviewed by the ITA is one of law rather than one requiring analysis of a factual record; consequently, the court, in addressing the issue, does not usurp the factfinding function of the agency. *See Railroad Yardmasters of America* v. *Harris,* 721 F.2d 1332, 1337–39 (D.C. Cir. 1983) (appellate court would consider issue not raised before National Mediation Board or before district court where the substantive issue was one of law, did not require further factual development, and had been fully briefed). Furthermore, because the issue is one of law and because the decision in *Freeport Minerals* postdated the proceeding below, there is no danger that Timken intentionally refrained from raising this issue administratively in order to obtain some advantage by review on a sparse record. Timken has arguably been taken by surprise by the *Freeport Minerals* decision; remand is called for so that its interests may be protected by the review appropriate under the law. Accordingly, upon remand the ITA shall obtain and review data for a period terminating with the date of its preliminary determination.[3]

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[2] The relevant statute provides only that the Court of International Trade shall "where appropriate" require exhaustion of administrative remedies, and so does not create a jurisdictional bar to review of issues not raised below. 28 U.S.C. § 2637(d) (1982); *see Rhone Poulenc, S.A.* v. *United States,* 7 CIT ——, ——, 583 F. Supp. 607, 611 (1984).

[3] Timken has contended that the ITA also erred in reviewing data from only April 1978 to November 1979, a period of less than two years. In this connection, an agency regulation provides that an application for revocation of an antidumping order will "[o]rdinarily * * * be considered only if there have been no sales at less than fair value *for at least a two-year period* following the date of publication * * * of an Antidumping Duty Finding * * *." 19 C.F.R. § 353.54(b) (1985) (emphasis added). In view of the court's determination that this action should be remanded for collection of additional data pursuant to *Freeport Minerals,* the issue of whether the ITA was obliged to review data for a two year period becomes moot since such a period will of necessity be reviewed upon remand.

B. *Failure to Collect Data for Period Already Reviewed*

Both the government and Timken ask this court for a remand to permit the ITA to obtain additional home market data for the period already reviewed; to investigate and verify cost of production data already on the record; and to reassess appropriate TRM model comparisons. NBCA argues against remand.

In its initial proceeding, the ITA reviewed data for the period from April 1, 1978 through November 14, 1979 to determine if there had been sales at less than fair value in that period. *See* 47 Fed. Reg. 25,757. During its review, the ITA used home market sales data that had been provided by NTN in response to Treasury Department questionnaires. Those questionnaires had requested not data on all home market sales of TRBs, but rather only data on sales of TRBs identical or "similar" to those sold for export to the United States. Thus, *NTN* made the initial determination of what constituted identical or similar TRB models, and provided home market data only as to those models. Also, NTN set forth the basis for its selection of similar models: the inside diameter, outside diameter, and width of the TRBs. The ITA accepted NTN's model comparisons and did not question the basis of the comparisons presented.

During the proceeding before the ITA followed the initial remand by the court, Timken for the first time contested the appropriateness of NTN's assertions as to what constituted "similar" TRB models. It presented a specific analysis of TRB parameters, and argued that performance parameters as well as geometric parameters were relevant for proper model selection. The ITA believed that Timken had raised substantial questions as to the appropriateness of model comparisons. It concluded, however, that the limited nature of the remand prevented it from requesting additional data from NTN, and found it could not address these model comparison questions in the absence of complete home market sales data. Also because of the absence of complete data, the ITA was not able to address other contentions made by Timken on remand as to the appropriateness of NTN's home market sales data selection although it believed that Timken's contentions cast doubt on the reliability of the sales information reported by NTN.

The data used by the ITA was not only incomplete in that it did not reflect home market sales of all TRB models, it was also incomplete in that it did not cover the entire time period that the agency should have reviewed under then existing law. Only on remand did the ITA realize that because there had been delays between the dates of export of TRBs and the dates of their resale in the United States, it should in the original proceeding have reviewed home market sales not only for the period beginning April 1, 1978, but also home market sales for an earlier period. Assuming for example that a TRB sold in the United States on April 1 had been exported to the United States four months earlier, the United States price of that TRB should have been compared with the value of an

identical or similar TRB sold in the home market four months earlier. *See* 19 C.F.R. § 153.2(a) (1979); *cf.* 19 U.S.C. § 1677b(a)(1) (1982), *amended by* 19 U.S.C.A. § 1677b(a)(1) (West Supp. 1985). In order to remedy its failure in the original proceeding to collect home market sales data for the earlier period, the ITA on the remand *added* to the administrative record home market sales data for the period from September 27, 1977 to March 20, 1978. That added data had earlier been provided to the Treasury Department in connection with its review. However, Treasury had not verified the data and the ITA did not verify it either, viewing verification procedures as outside the scope of the remand.

The ITA also added to the record on remand data on production costs for the same period, September 27, 1977 to March 20, 1978, that had also been provided to Treasury in connection with its review, but that had never been verified. Timken questioned the reliability of the added data, but, again, although the ITA believed that Timken had raised significant questions, it did not verify the data. It did, however, use the data on remand both to calculate appropriate adjustments for differences in merchandise and to address new contentions by Timken that NTN had sold TRBs in the home market at less than the cost of production.[4]

The government now cites the incompleteness and lack of verification of the data used below, and the related issue of the appropriateness of model comparisons, as the basis for its request that the case be remanded a second time to permit the ITA to determine, among other things, (1) NTN prices for all TRBs sold in the home market during the relevant period, (2) whether the proper TRB models were compared, and (3) the accuracy of all pertinent NTN production costs. Timken concurs in this request for remand; NBCA opposes.

1. Necessity of Complete Home Market Data

The ITA abused its discretion in failing to collect the data necessary to ascertain the appropriateness of NTN's selection of similar TRB models. The issue of what constitutes proper model comparisons and the related issue of home market data selection go to the heart of the ITA's determination, concerning as they do the identity of the merchandise the ITA compared for the purpose of determining dumping margins. The basic task of the ITA in an action such as this is to compare the price of merchandise exported to the United States to the value of "such or similar merchandise" sold in the foreign market. *See* Antidumping Act of 1921, § 205(a), 19 U.S.C. § 164 (1976) (foreign market value is, among other things, the price at the time of exportation of merchandise to the United States at which "such or similar merchandise" is sold in the for-

[4] The ITA found that in fact NTN had in various periods sold TRBs in the home market at less than the cost of production. *See* 19 C.F.R. § 153.5 (1979); 19 C.F.R. § 353.7 (1985). This suggests the importance to the ITA's determination of the data added on remand, and hence the importance of verification.

eign market), *repealed by* the Trade Agreements Act of 1979, Pub. L. No. 96-39, tit. 1, § 106, 93 Stat. 144, 193.[5] Where identical merchandise was not sold in both the foreign market and in the United States, a determination as to which foreign market merchandise is "similar" to merchandise sold in the United States may be of great importance in a determination of whether there are dumping margins.

The statute defining "such or similar merchandise" sets forth three categories, or definitions, each of which describes increasingly dissimilar merchandise; the ITA must select merchandise from the first applicable category. Thus, pursuant to this statute, the ITA must select merchandise *identical* to that sold in the United States if it is available, 19 U.S.C. § 170a(3)(A) (1976); if that is not available, the ITA must select merchandise *like* the merchandise under consideration in materials and use, and approximately equal in value to the merchandise sold in the United States, *id.* § 170a(3)(B); only if that is not available may the ITA select merchandise of the *same general class or kind* as the merchandise sold in the United States, and like that merchandise in its use, if the ITA determines that such merchandise may reasonably be used for comparison, *id.* § 170a(3)(C).

The statute does not make explicit whether, if two or more products fall within the definition of a given subsection of the statute, the ITA must determine which of those products is *most* similar to merchandise sold in the United States. However, such a requirement is implicit in the statutory scheme. The arrangement of definitions in the statute is such that the requirement that the ITA choose merchandise within the first applicable definition amounts to a requirement that it choose the most similar merchandise—at least insofar as the broad statutory definitions of "such or similar merchandise" are concerned. The spirit if not the letter of this requirement obligates the agency to also ascertain what constitutes the most similar merchandise from within a given definition. Thus, in *B.A. McKenzie & Co.* v. *United States*, 42 Cust. Ct. 718, 724, A.R.D. 103 (1959), *aff'd*, 47 CCPA 143, C.A.D. 748 (1960), the court observed that if values can be found both for "such" and for "similar" merchandise, the law requires that the value of "such" merchandise should be adopted because it more nearly represents the value of the merchandise under appraisement. Accordingly, the court held that, for the same reason, if values can be found only for items of "similar" merchandise, the value of the item *most* similar to that under appraisement should be adopted. Moreover, an inter-

[5] Although the Antidumping Act of 1921, ch. 14, tit. II, 42 Stat. 11, was repealed by the Trade Agreements Act of 1979, which became effective on January 1, 1980, the substantive provisions of the 1921 Act apply to unliquidated entries made prior to 1980. Moreover, the substance of the antidumping law under the 1979 Act is in large part identical to the law under the 1921 Act. *See* H.R. Rep. No. 317, 96th Cong., 1st Sess. 48, 59 (1979) (relatively little change is made by the 1979 Act in the substantive provisions of the antidumping law). Hereinafter, references to sections of the Antidumping Act of 1921 will merely cite to the volume of the United States Code in which they formerly appeared.

pretation of the statute requiring selection of the *most* similar merchandise is most likely to ensure that the ITA "makes the fair value comparison on a fair basis—comparing apples with apples," *Smith-Corona Group* v. *United States,* 713 F.2d 1568, 1578 (Fed. Cir. 1983), *cert. denied,* 465 U.S. 1022 (1984).

The second definition set forth in the statute defines "such or similar merchandise" as:

> Merchandise (i) produced in the same country and by the same person as the merchandise under consideration, (ii) like the merchandise under consideration in component material or materials and in the purposes for which used, and (iii) approximately equal in commercial value to the merchandise under consideration.

19 U.S.C. § 170a(3)(B) (1976). As described above, NTN provided to the ITA data on only that merchandise that NTN had *itself* determined to be identical or similar to merchandise sold in the United States. NTN asserts that this selected data established that the TRB models it was characterizing as "similiar" met each of the requirements of similarity set forth in the statutory definition quoted above, and contends that the ITA therefore acted reasonably and upon substantial evidence in determining that those models were "similar" within the meaning of the statute.

The court assumes, without deciding, that the administrative record during the initial proceeding in this action contained substantial evidence supporting NTN's assertion that the merchandise it proposed as "similar" fell within the statutory definition. It does not follow, however, that there was substantial evidence that the proposed merchandise was the *most* similar merchandise of all the TRB models sold by NTN in the home market, including TRBs as to which no data had been provided. Moreover, even an ITA determination that is supported by substantial evidence may be overturned if it is otherwise not in accordance with law. 19 U.S.C. § 1516a(b)(1)(B) (1982); *see Chapman* v. *Donovan,* 9 CIT ——, ——, Slip Op. 85–113, at 4 (Oct. 25, 1985) (in addition to the requirements of substantial evidence there is the further requirement that rulings be in accordance with statute and that there be a showing of reasoned analysis); *cf. Trans-American Van Service, Inc.* v. *United States,* 421 F. Supp. 308, 316 (N.D. Tex. 1976) (an agency's finding may reflect arbitrary and capricious action even though supported by substantial evidence). In certain cases, an agency's failure to collect pertinent data or to consider a relevant aspect of an issue, constitutes an abuse of discretion. *Kelly* v. *Secretary of United States Department of Labor,* 9 CIT ——, ——, Slip Op. 85–132, at 7–8 (Dec. 30, 1985) (failure of OTAA, in determining eligibility of employees for trade adjustment assistance, to collect or consider data from company that accounted for the largest decline in order for the product in question meant that the agency's methodology was not accordance with law); *Rutherford* v. *United States,* 438 F. Supp.

1287, 1291 (W.D. Okla. 1977) (to act without collecting the necessary facts is an abuse of discretion), *aff'd,* 582 F.2d 1234 (10th Cir. 1978), *rev'd on other grounds,* 442 U.S. 544 (1979); *Motor Vehicle Manufacturers Association of the United States, Inc.* v. *State Farm Mutual Automobile Insurance Co.,* 463 U.S. 29, 43 (1983) (abuse of discretion for agency to fail to examine relevant data); *cf. Natural Resources Defense Council, Inc.* v. *NRC,* 547 F.2d 633, 646 (D.C. Cir. 1976) (agency may abuse its discretion by a decision that the record will not sustain in the sense that it raises fundamental questions for which the agency has adduced no reasoned answers), *rev'd on other grounds sub nom. Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.,* 435 U.S. 519 (1978).

By failing to collect home market sales data on TRB models other than those characterized by NTN as similar or identical, the ITA abdicated to NTN its statutory responsibility for determining what TRB models produced by NTN were the *most* similar to models sold in the United States. As the ITA now acknowledges, it cannot, using the selected data available to it, determine whether there exist home market TRB models that would have been more appropriate for purposes of comparison that were the models selected by NTN.

It is of particular importance that the administering agency itself make the required determination of what constitutes most similar merchandise, rather than delegating that responsibility to an interested party, considering that the issue may be a complex one on which reasonable minds could differ. For example, of two potentially "similar" foreign market products, one product could be most similar to merchandise sold in the United States in its use, while the other might be more similar in its materials. It is the administering agency rather than an interested party that should make the determination as to what "similar" characteristics are of the most significance. Additionally, it is hard to imagine that a foreign manufacturer, given the option of selecting what constitutes similar merchandise, and assuming that there exists more than one product from which such a choice can be made, would not make the choice of merchandise most advantageous to itself.[6]

If, for example, there were two foreign market products that could be considered "similar" but which differed in value, a foreign manufacturer would have an incentive to select as "similar" the product that was of lower value, as such selection could result in lower margins. Congress could not have intended that an interested party be accorded so much control over a determination of such importance. Indeed, by accepting a foreign manufacturer's assertions as to what constitutes most similar merchandise without ob-

[6] The court is in no way indicating that NTN has acted in bad faith in its production of data. NTN was asked to provide information only on those models that NTN determined were identical or similar; the court concludes not that NTN erred in producing incomplete home market sales data, but rather that the ITA erred as a matter of law in not requesting complete data where that data was necessary.

taining the complete data needed to determine the appropriateness of those assertions, the ITA in this action violated the spirit of the statutory requirement that it verify the data relied upon in proceedings involving revocation of antidumping orders. *See Al Tech Specialty Steel Corp.* v. *United States,* 745 F.2d 632, 634 (Fed. Cir. 1984); 19 U.S.C. § 1677e(a) (1982), *as amended,* Pub. L. No. 98-573, tit. VI, § 618, 98 Stat. 3037 (1984), *reprinted in* 19 U.S.C.A. § 1675e(a) (West Supp. 1985); H.R. Rep. No. 725, 98th Cong., 2d Sess. 42-43 (1984) (the Committee on Ways and Means believes it is essential that whenever the ITA revokes an antidumping duty order, the interests of domestic industry be protected by full verification of the information relied upon in making that determination). What is more, the failure to collect complete data deprived Timken of information essential to the assertion of its rights. *See Freeport Minerals,* 776 F.2d at 1033 (Congress intended that the ITA provide the maximum availability of information to an interested party because access to information is imperative for offensive assertion of its rights).

NBCA contends, however, that the government, by its present request for a remand to permit the ITA to obtain complete home market data and to reassess model comparisons, is attempting to apply a new policy not in effect at the time of the ITA's original determination. *See American Trucking Associations, Inc.* v. *Frisco Transportation Co.,* 358 U.S. 133, 146 (1958) (agency power to correct ministerial errors may not be used as guise for changing previous decisions because the wisdom of those decisions appears doubtful in light of changing policies); *Upjohn Co.* v. *Pennsylvania Railroad,* 381 F.2d 4, 5 (6th Cir. 1967) (agency may not apply new policy retroactively to a proceeding concluded three years previously). The ITA apparently has a current practice of obtaining complete home market sales data and itself determining what constitutes most similar merchandise. *See generally Bicycle Speedometers From Japan; Final Results of Administrative Review of Antidumping Finding,* 47 Fed. Reg. 28,978, 28,980 (1982); *Stainless Clad Steel Plate From Japan: Preliminary Determination of Sales at Less Than Fair Value and Suspension of Liquidation,* 47 Fed. Reg. 12,200 (1982). But here, the government, in seeking remand on this issue, is not attempting to substitute use of a current ITA policy for use of an earlier, reasonable policy. Rather, the method *originally* used in this action by the ITA to fulfill its statutory obligation to determine the value of merchandise most similar to that sold in the United States—*i.e.,* collection of data so incomplete that the ITA could not in fact determine what constituted most similar merchandise—was unreasonable and an abuse of discretion.

The ITA also abused its discretion by failing in the initial proceeding to obtain *any* data for a substantial period of time relevant to its determination, *i.e.,* the data from September 1977 to March 1978. *See supra* pp. 19-20. The government has presented no expla-

nation for the ITA's failure to collect that data, which was necessary for the performance of significant statutorily mandated calculations. Nor was that error sufficiently remedied on remand, for while the ITA did on remand add the necessary data to the record, that data was never verified.

These errors in data collection and model selection go to the heart of the ITA's determination. In addition, the government acknowledges a number of other errors in the proceedings below. For example, it agrees with Timken that there is a lack of evidence on the administrative record to support the ITA's determinations regarding adjustments to foreign market value for advertising and inland freight expenses, and regarding certain deductions from ESP for administrative salaries and warehouse expenses.[7] Moreover, the first remand resulted from the government's and ITA's assertion that the ITA had failed to adhere to statutory requirements and to its own precedent regarding the methodology used in a number of other significant calculations. As the government itself suggests, the nature and number of the errors that marred the proceedings below call into question the very integrity of the ITA's determination.

The errors committed below—and particularly those in data and model selection, as well as the ITA's error under *Freeport Minerals*—cannot be remedied by addressing each in isolation. For these errors affect the entirety of the data base thus far used by the ITA. The vice of a poor data base is that it taints even good methodology. Thus, even if the ITA used appropriate methodology below, its computations were necessarily flawed, if the data base was fundamentally inadequate. A remand order that fails to direct a review of *all* ITA calculations will therefore risk a final determination containing error and internal inconsistency. Hence, a remand for all purposes is appropriate. *See Tenneco Oil Co.* v. *Department of Energy*, 475 F. Supp. 299, 309 (D. Del. 1979) (court would consider a claim not raised below where to do otherwise would create the anomaly of requiring the reviewing court, or the administrative agency on remand, to apply an arguably erroneous standard in deciding those claims that had been properly raised); *cf. Ford Motor Co.* v. *NLRB*, 305 U.S. 364, 372 (1939) (circuit court acted properly in remanding action to NLRB for reconsideration of entire case).

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[7] With regard to advertising, the ITA deducted certain advertising costs as representing differences in circumstances of sale, yet the administrative record reveals evidence of only corporate image or of general product line advertising rather than of advertising directly related to the TRB sales under consideration or attributable to later sales of those TRBs by a purchaser. This was contrary to agency regulation. *See* 19 C.F.R. §153.10 (1979); 19 C.F.R. §353.15 (1981); *Carlisle Tire & Rubber Co.* v. *United States*, 3 CIT 163, 167–68 (1982); *Brother Industries, Ltd.* v. *United States*, 3 CIT 125, 151, 540 F. Supp. 1341, 1365 (1982), *aff'd sub nom. Smith-Corona Group* v. *United States*, 713 F.2d 1568 (Fed. Cir. 1983), *cert. denied*, 465 U.S. 1022 (1984). Regarding inland freight costs, the ITA now states that certain freight costs for the transportation of TRBs from a manufacturing plant to a distribution center were improperly allowed as costs of differences in circumstances of sale because those costs represented a general overhead expense rather than an expense directly related to the sales under consideration. *See* 19 C.F.R. §153.10(a) (1979); 19 C.F.R. §353.15(a) (1985).

2. Exhaustion—Incomplete Data

A remand is appropriate even though Timken, in the initial proceeding before the ITA, failed to raise a number of the contentions raised in this action, including those involving the ITA's failure to obtain complete data and to determine what constituted most similar merchandise. As discussed above, application of the doctrine of exhaustion of administrative remedies is within the discretion of the court. "Whenever a question concerning administrative, or judicial, reconsideration arises, two opposing policies immediately demand recognition: the desirability of finality, on the one hand, and the public interest in reaching what, ultimately, appears to be the right result on the other." *CAB* v. *Delta Air Lines, Inc.*, 367 U.S. 316, 321 (1961) (footnote omitted); *cf.* 4 K. Davis, Administrative Law Treatise § 26:2, at 420–21 (2d ed. 1983) (courts should consider the merits in deciding exhaustion issues and should acknowledge that they do so); *see also Hormel* v. *Helvering*, 312 U.S. at 558 (Court stated that implication of an earlier case was that unexhausted issue would have been remanded had the newly raised issue been of sufficient merit).

The gravity of the errors in this action, when considered with the fact that the government itself is requesting a remand and representing that the ITA's errors call into question the integrity of its determination, suggests that in this action, "the public interest in reaching what ultimately appears to be the right result" outweighs the desirability of finality. Then too, since the government itself is asking for a remand despite Timken's failure to exhaust its remedies, the significance of one of the policies underlying the exhaustion doctrine, namely, that a court should not usurp an agency's function by considering issues the agency has not first considered, is of reduced significance. *See McKart* v. *United States*, 395 U.S. 185, 195 (1969) (notions of administrative autonomy require that the agency be given a chance to discover and correct its own errors). *Cf. Mathews* v. *Eldridge*, 424 U.S. 319, 326–28 (1976) (Secretary of HEW may waive exhaustion requirement regarding the necessity of a final administrative decision).

Also relevant is the ITA's explanation that its errors in data collection and model selection arose from the transitional nature of this case, which was inherited from the Treasury Department. These errors thus resulted from a violation of a significant public policy, namely, that the ITA should provide the same quality of review in all cases, regardless of whether it handled the cases from their inception. *See Freeport Minerals*, 776 F.2d at 1033–34; *Board of Public Instruction* v. *Finch*, 414 F.2d 1068, 1073 (5th Cir. 1969) (court would disregard failure to exhaust remedies where, *inter alia*, agency action was contrary to a public policy extending beyond the rights of the individual litigants).

A number of the policy considerations underlying the exhaustion doctrine are pertinent here, including the consideration of fairness to litigants and the fact that litigants should not be encouraged to

delay raising claims. *See McKart* v. *United States*, 395 U.S. at 195 (one reason for exhaustion doctrine is that frequent and deliberate flouting of administrative processes could weaken the effectiveness of an agency by encouraging people to ignore its administrative procedures). The court is also aware that NTN and NBCA may incur substantial cost and inconvenience as a result of a second remand. It is also aware that Timken could and should have raised its concerns as to the completeness of home market sales data and as to model similarity during the original proceeding before the ITA. Despite these concerns, however, the court, for the reasons set forth above, finds on balance that the interests of justice require a remand.

IV. *Legal Issues Raised Below*

During this action, Timken has raised two legal issues that it also raised below, first, the issue of whether the statute governing calculation of exporter's sales price (ESP) requires a deduction of a subsidiary's profit, and, second, the issue of the type of evidence needed to establish a relationship between cost and value, in the context of calculations concerning differences in circumstances of sale. These issues are addressed below.

A. *Deduction of Profit From ESP*

Timken contends that in calculating the exporter's sales price of TRBs produced by NTN and sold by NBCA in the United States, the ITA should have deducted any profits earned by NBCA.

Under the Antidumping Act of 1921, the United States price of imported merchandise must be compared with the foreign market value of identical or similar merchandise to determine whether there were sales in the United States at less than fair value. When imported merchandise is initially sold to an *unrelated* purchaser in the United States, "purchase price"—the price paid by the purchaser minus various deductions specified by statute—is used as the United States price. Antidumping Act of 1921, § 203, 19 U.S.C. § 162 (1976). However, when, as in this case, the merchandise is first sold to a *related* purchaser in the United States, *e.g.*, to a subsidiary of the exporter, "exporter's sales price" is used as the United States price. ESP is the price at which the merchandise is subsequently sold by the related party in an arm's length transaction, minus deductions specified in section 204 of the 1921 Act. 19 U.S.C. § 163 (1976).

One of the deductions from ESP required by section 204 is "the amount of the *commissions*, if any, for selling in the United States the particular merchandise under consideration" (emphasis added). The ITA in this action interpreted the word "commissions" literally, taking the position that "[t]here is no statutory provision for a deduction from the ESP of a U.S. subsidiary's profit." 47 Fed. Reg. at 25,758. It therefore deducted from ESP commissions paid out by

NBCA to its selling agents, but refused to deduct *profits* earned by NBCA on resale of the imported merchandise. Timken claims that this error, contending that the term "commissions," as understood when the 1921 Act became law, encompasses a subsidiary's profits.

1. Standard of Review

The interpretation of a statute by the agency entrusted with its administration is entitled to weight, especially where that interpretation represents longstanding administrative practice. *See Zenith Radio Corp.* v. *United States,* 437 U.S. 443, 450 (1978); *Ambassador Division of Florsheim Shoe* v. *United States,* 748 F.2d 1560, 1563 (Fed. Cir. 1984); *Smith-Corona Group* v. *United States,* 713 F.2d 1568, 1576–77, 1579 (Fed. Cir. 1983), *cert. denied,* 465 U.S. 1022 (1984); *Carlisle Tire & Rubber Co.* v. *United States,* 5 CIT 229, 232, 564 F. Supp. 834, 837 (1983). An agency's interpretation of a statute it administers need only be reasonable; there is no requirement that it be the only possible interpretation. *Asahi Chemical Industry Co.* v. *United States,* 4 CIT 120, 123, 548 F. Supp. 1261, 1264 (1982); *see Train* v. *Natural Resources Defense Council, Inc.,* 421 U.S. 60, 75. 87 (1975); *Unemployment Compensation Commission* v. *Aragon,* 329 U.S. 143, 153–54 (1946).

Moreover, if the language of a statute is clear and unambiguous, that language must ordinarily be regarded as conclusive, absent clearly expressed legislative intent to the contrary. *See Bread Political Action Committee* v. *Federal Election Commission,* 455 U.S. 577, 580 (1982); *Board of Governors of Federal Reserve System* v. *Dimension Financial Corp.,* —— U.S. ——, ——, 54 U.S.L.W. 4101, 4103, 4105 (1986) (courts must give effect to the unambiguously expressed intent of Congress; application of the "broad purposes" of legislation at the expense of specific provisions ignores the complexity of the problems Congress is called upon to address). Courts may in rare cases override the literal terms of a statute where application of those terms would lead to an absurd result. *Crooks* v. *Harrelson,* 282 U.S. 55, 59–60 (1930).

Against this background, the court finds, for the reasons that follow, that the ITA's interpretation of the word "commissions" to mean only commissions—and not profits—represents longstanding administrative practice; that the meaning of the term "commissions" is clear; that there is no basis in legislative history or in the terminology in use at the time of passage of the Antidumping Act for disregarding that meaning; and that adherence to the clear meaning of the word "commissions" does not create an absurd result. The ITA's interpretation is therefore upheld.

2. Agency Interpretation

During oral argument, the government indicated to the court that the ITA's interpretation of the word "commissions" represents longstanding administrative practice. Timken has not brought to the court's attention any decisions to the contrary. Beyond that,

various documents suggest that the ITA's position indeed represents a longterm practice with its inception in the Treasury Department, the previous administering agency.

Specifically, two bills have in the past been introduced that would, among other things, have modified section 204 to require deduction of "the amount of commissions *and profits*" from ESP. S. 1726, 90th Cong., 1st Sess., § 3 (1967) (bill introduced by Sen. Hartke); S. 3606, 87th Cong., 2d Sess., § 3(b) (1962) (bill introduced by Sen. Humphrey) (emphasis added). It would appear that these attempts to add a deduction for profits were made because the administering agency was in fact *not* deducting profits from ESP.

Additionally, a 1979 report by the Comptroller General indicates that section 204 has been understood literally. U.S. General Accounting Office, *U.S. Administration of the Antidumping Act of 1921; Report to the Congress of the United States by the Comptroller General of the United States,* ID-79-15, at 24-27 (Mar. 15, 1979). Although the report does not directly address the issue here raised, a sample ESP calculation contained in the report is illuminating. ESP as calculated in the report includes the profits made by a United States affiliate; deducted from that ESP are selling expenses, transportation and duties—but *not* the affiliate's profit. *Id.* This sample calculation ostensibly represented Treasury Department practice. *See also* Hemmedinger & Barringer, *The Defense of Antidumping and Countervailing Duty Investigations Under the Trade Agreements Act of 1979,* 6 N.C.J. Int'l L. & Com. Reg. 427, 433-34 (1981) (for the foreign manufacturer, ESP "often is a more favorable basis of calculating fair value because, unlike purchase price, the profit of the U.S. importer is included in the net adjusted price, resulting in a higher United States price").

In light of the ITA's representation to this court and considering the above cited materials, the court finds that the ITA's interpretation of the word "commissions" in section 204 represents longstanding practice.

3. Language of the Statute

The literal language of section 204, calling for the deduction of "the amount of the commissions, if any, for selling in the United States the particular merchandise under consideration," on its face clearly calls for the deduction of commissions, and just as clearly does not call for the deduction of profits. There is no basis in common language usage for a claim that the profit earned by a subsidiary or other related party upon the sale of goods originally purchased from a parent company constitutes a "commission" to that party. A commission is commonly understood to be an allowance or percentage given to an agent for transacting business for another. *See* Funk & Wagnalls New Standard Dictionary of the English Language 537 (I. Funk ed. 1942); 1 J. Bouvier, Law Dictionary and Concise Encyclopedia 548 (F. Rawle 3d rev. 1914). "Profit," by contrast, is the excess of a selling price over an original cost. *See*

Funk and Wagnalls New Standard Dictionary of the English Language 1979 (I. Funk ed. 1942); 3 J. Bouvier, Law Dictionary and Concise Encyclopedia 2737 (F. Rawale 3d rev. 1914).

Timken argues, however, that at the time of passage of the 1921 Act, the word "commission" was a Customs Service term of art denoting generally *any* profit accruing to a related importer as a consequence of the sale of imported goods. In the case of an agent selling on consignment, that profit, according to Timken, generally would accrue in the form of a commission (in the usual sense of that word), but in cases involving other related parties, that benefit might accrue in the form of profit upon sale of the goods in the United States. Under this reading of "commissions," the ITA should deduct from ESP not only commissions *paid* by a United States subsidiary to its selling agents, but also "commissions" *earned* by a United States subsidiary in the form of profits from a resale of imported merchandise.

In support of this argument regarding Customs Service use of the term "commissions," Timken relies primarily upon colloquy before the Senate Finance Committee in 1921 between Senator McCumber and a special agent for the Customs Service, George Davis. In that colloquy, Mr. Davis explained the methodology used in arriving at ESP under the bill that became the 1921 Act. On two occasions, he seemed to identify "commission" with "profit."

> *Mr. Davis* * * *. For instance, there is an agent in this country who sells merchandise in Kansas City for dollars and cents, including duty, ocean freight, the expense of getting it from New York to Kansas City, *and the agent's commission, or his profit.* This order is transmitted to the foreign manufacturer. He knows the merchandise is going to Kansas City. It may come forward on a consigned invoice, consigned to the agent himself, and the Government does not know anything about the sales price to Kansas City. Such price is the foreign exporter's sales price and that should be distinguished from the open purchase price paid by the bona fide American importer who buys direct from the manufacturer. There might be dumping in either instance, but the two prices should be distinguished.
>
> *Senator McCumber.* Where there is not difference in the price, how would you determine which one to follow?
>
> *Mr. Davis.* We would have to subtract from the price in Kansas City the expense of bringing it from foreign markets to Kansas City, the duty, *the foreign agent's commission, or profit,* and the net amount, is the amount that goes back to the other side becomes the exporter's sales price.

S. Comm. on Finance, *Emergency Tariff and Antidumping: Hearing on H.R. 2435,* 67th Cong., 1st Sess. 42–43 (1921) (emphasis added).

Timken does not argue that Mr. Davis, in the above colloquy, actually had in mind the profits earned by a subsidiary of a foreign exporter. It rather argues that Mr. Davis was explaining the general concept involved, namely, that what is deducted from ESP is the

benefit accruing to the related party selling in the United States—whether in the form of a paid commission or other profit. While Timken's reading is plausible, an equally plausible reading of Mr. Davis's remarks is to understand his reference to "commission, or profit" as merely reflecting the fact that a commission received by an agent will generally represent a profit to that agent—a fact that does not necessitate a conclusion that profit in any form that is earned by resale of goods by a subsidiary corporation must therefore be characterized as a "commission." Furthermore, "[r]eliance on such isolated fragments of legislative history in divining the intent of Congress is an exercise fraught with hazards, and 'a step to be taken cautiously.' " *New England Power Co.* v. *New Hampshire,* 455 U.S. 331, 342 (1982) (quoting *Piper* v. *Chris-Craft Industries, Inc.,* 430 U.S. 1, 26 (1977)); *see Garcia* v. *United States,* —— U.S. ——, ——, 105 S. Ct 479, 484 (1984) (isolated statement of floor of House not impressive legislative history); *United States* v. *Taylor,* 752 F.2d 757, 764 (1st Cir.), *jurisdiction postponed to hearing on merits sub nom. Maine* v. *Taylor,* —— U.S. ——, 106 S. Ct. 307 (1985).

Withal, Timken claims to find further support for a reading of the term "commission" to include profits whether earned via commission or otherwise, in the unusually broad meaning ascribed to the word "consignment" under the Tariff Act of 1913, which was in effect at the time of passage of the 1921 Antidumping Act. *See J.H. Cottman & Co.* v. *United States,* 20 CCPA 344, 354–56, 359 T.D. 46,114 (1932) (court looks to meaning of terms in customs valuations law in construing similar language in antidumping law), *cert. denied,* 289 U.S. 750 (1933); R. Sturm, Customs Law and Administration § 47.5, at 366 (2d ed. 1980). Specifically, Timken cites a section of the Tariff Act that provided for the calculation of a United States value by taking a United States sale price and deducting from it certain items including "a *commission* not exceeding 6 per centum if any has been paid or contracted to be paid on *consigned* goods * * *." Tariff Act of 1913, ch. 16 § III, para. L, 38 Stat. 114, 186 (emphasis added). This provision somewhat resembles the provision of section 204 for the calculation of ESP by deduction of commissions from a United States price.

Timken points out that the language in the 1913 Tariff Act section regarding goods "consigned" for sale was understood to refer to goods imported by a related party for sale in the United States, even if the goods in question were not being consigned from a principal to an *agent.* Thus, in *United States* v. *Johnson Co.,* 9 Ct. Cust. App. 258, 266–68, T.D. 38,215 (1919), goods sent from a factory abroad that was owned by the party importing the goods were deemed "consigned." Timken's argument seems to be that because the term "consign" thus has a broader meaning under the Tariff Act of 1913 then it does in common parlance, then the word "commission"—which is often used in conjunction with the word "con-

signment," as the term denoting the benefit accruing to the party receiving consigned goods—also has a broader meaning, and hence encompasses the concept of any profit earned by a related party "consignee." The difficulty is that Timken fails to provide any direct support for this proposition. Therefore, its argument that in Customs Service terminology of 1921, the clear meaning of the word "commissions" *was* "commissions or profits," is insufficiently established.

There is an additional reason for rejecting Timken's argument. Timken does not contend that whatever profits are claimed by a subsidiary should be deducted from ESP, but rather maintains that "*reasonable* profits" should be deducted from ESP. Deduction of "reasonable" profits is advocated to avoid an alleged danger that a related exporter and importer could manipulate profits so as to obtain maximum benefit from an ESP calculation. There is nothing in legislative history to indicate a congressional intent that "reasonable" profits be deducted. Further, Congress knew how to provide for the deduction of only reasonable commissions or profit when it wished to do so. Thus, the 1913 Tariff Act section discussed above include a "lid" on the amount of commissions and profits that could be deducted from the United States price. That "lid" provided that commissions not exceeding six per cent could be deducted when goods were consigned and that profit not exceeding eight percent could be deducted when goods were purchased. Tariff Act of 1913, ch. 16 § III, para. L, 38 Stat, 114, 186.[8] The absence of similar specificity as to a percentage amount of commissions that may be deducted from ESP under section 204 suggests that Congress did not intend to limit the deductions for "commissions" to only "reasonable commissions" and that Timken's reading of "commissions" as "commissions and *reasonable* profits" is unduly creative.

4. International Law

Timken cites a provision of the International Antidumping Code as further evidence that section 204's reference to "commissions" should be understood as a reference to "commissions and profits." The International Antidumping Code is a multilateral agreement signed by the United States in 1979 in the course of the Tokyo Round of Multilateral Trade Negotiations (MTN). Agreement on Implementation of Article VI of the General Agreements on Tariffs and Trade, Apr. 12, 1979, 31 U.S.T. 4919 T.I.A.S. 9650, *reprinted in* H.R. Doc. No. 153, part I, 96th Cong., 1st Sess. 313–14 (1979) (International Antidumping Code or Code).

[8] Presumably, these maximum percentages were included in the Tariff Act section because importers would have benefited by large deductions of commissions or profits under the appraisement law, inasmuch as such deductions would have reduced the United States price and so in certain cases reduced dutiable value. By contrast, in calculating ESP under section 204 of the 1921 Antidumping Act, an importer will generally not benefit from a deduction of profits because deduction of profits will decrease ESP and thus increase the possibility that sales at less than fair value will be found. *See* Hemmendinger & Barringer, *supra*, 6 N.C.J. Int'l L. & Com. Reg. 433–34.

The Code, together with other trade agreements negotiated during the MTN, was approved and implemented by passage of the 1979 Trade Agreements Act (1979 Act), which repealed the 1921 Antidumping Act. Trade Agreements Act of 1979, Pub. L. No 96-39, § 2, 93 Stat. 147, 19 U.S.C. § 2503 (1982). The Code provides that where an export price may be unreliable because of an association between the exporter and importer, an export price may be constructed on the basis of the price at which the imported products are first resold to an independent buyer. When export price is so constructed, "allowance for costs, including duties and taxes, incurred between importation and resale, *and for profits accruing,* should also be made." International Antidumping Code, art. 2, paras. 5-6 (emphasis added). In other words, the Code indicates that "profits accruing" should be deducted from a constructed export price that is the analogue of ESP.[9]

Timken argues that because a provision of this international code—implemented in 1979—provides a deduction from ESP for "profits accruing," section 204 of the Antidumping Act of *1921* should be interpreted similarly to allow for deduction of profits. Timken's argument for such consistency of interpretation is that the Code as a whole has been characterized as "consistent" with the 1979 Act; that the ESP provisions of the 1979 Act and the 1921 Act are in relevant parts identical; and that therefore the ESP provisions of the 1921 Act and of the Code necessarily must be consistent." *See* S. Rep. No. 249, 96th Cong., 1st Sess. 1, 15-16, *reprinted in* 1979 U.S. Code Cong. & Ad. News 381, 401-02 (S. Rep. No. 249) (bill that became the 1979 Act implements the Tokyo Round of the MTN and adds a comprehensive statute that replaces the Antidumping Act of 1921 and is consistent with the MTN Antidumping Code); Statements of Administrative Action, *reprinted in* H.R. Doc. No 153, 96th Cong., 1st Sess., part II, at 392 (1979), *and in* 1979 U.S. Code Cong. & Ad. News 665, 667 (the 1979 Trade Agreements Act approves and implements the trade agreements negotiated in the MTN and has been developed to be fully consistent with those agreements). *Compare* Tariff Act of 1930, § 772, *as amended,* 19 U.S.C. § 1677a (1982) *with* Antidumping Act of 1921, § 204.

In analyzing the current Code, it is useful to review legislative history pertaining to its *predecessor,* the 1967 International Antidumping Code. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, June 30, 1967, 19 U.S.T. 4348, T.I.A.S. 6431, *reprinted in* J. Jackson, World Trade and the Law of GATT § 16.6, at 426-28 (1969) (1967 Code). The 1967 Code, unlike the current Code, was never the subject of implementing legislation in the United States. S. Rep. No. 249 at 1. However, like the current Code, it included an ESP provision providing that "al-

[9] Such constructed export price will hereinafter also be referred to as "ESP."

lowance for * * * profits accruing *should also be made.*" 1967 Code, art. 2, para. f (emphasis added).

The Executive Branch in a report to Congress in 1968 attempted to demonstrate that the 1967 Code was consistent with the Antidumping Act of 1921. That report related each provision of the Code to the "relevant provisions" of the 1921 Act and to the regulations and administrative practice thereunder. Executive Branch, *Analysis of International Antidumping Code in Relation to Antidumping Act, 1921* (1968), *reprinted in* S. Comm. on Finance, 90th Cong., 2d Sess., *Text of Antidumping Act, 1921, International Dumping Code, and Related Materials* 55, 60 (Comm. Print 1968). With regard to calculation of ESP, the "relevant provision" of the 1921 Act was unquestionably section 204. In the course of an analysis of the here pertinent provision of the 1967 Code, paragraph f, the Executive Branch report stated:

> In addition, paragraph (f) provides that due allowance shall be made in each case, on its merits, for the differences in conditions and terms of sale, for the differences in taxation, and for the other differences affecting price comparability. This provision is consistent with the [1921 Antidumping Act]. *Finally, paragraph (f) provides that in the cases involving constructed export price * * * allowance for costs, including duties and taxes, incurred between importation and resale, and for profits accruing, should also be made. Since this is a hortatory provision, it creates no inconsistency with the Act.*

Comm. Print 60 (emphasis added). The above analysis is notable in that it apparently found the provision of the 1967 Code concerning "profits accruing" to be not inconsistent with the relevant provision of the 1921 Act (section 204) *only* because the Code provision was "hortatory" in nature. Apparently, the word "should" in the Code provision—"allowance * * * for profits accruing, *should* also be made" (emphasis added)—was understood as an exhortation rather than as a requirement. This suggests that the ESP provision of the 1967 Code was never perceived as the equivalent of section 204 of the 1921 Act but, to the contrary, was regarded as "consistent" with that section only because the Code provision was not viewed as mandatory.

Because this legislative history contradicts an argument that section 204 should be viewed as in substance identical to the ESP provision of the *1967* International Antidumping Code, it similarly contradicts Timken's argument that section 204 must be viewed as "consistent with" the ESP provision of the *current* International Antidumping Code.

Timken contends that despite this legislative history, nothing *precludes* requiring a deduction of profits under United States law so as to ensure conformity of that law with the Code provision. It further asserts that many of the trading partners of the United States deduct profit from ESP, and that a failure to interpret

United States law to provide for such a deduction creates a disparity that operates to the detriment of domestic industry in contravention of the general intent of Congress that the antidumping law protect such industy. *Cf. J.C. Penney Co.* v. *United States Treasury Department,* 439 F.2d 63, 64 (2d Cir.), *cert. denied,* 404 U.S. 869 (1971) (the Antidumping Act is designed to prevent actual or threatened harm to a domestic industry caused by the sale of merchandise at prices lower than those in the country of origin). But even assuming, *arguendo,* that the Code provision regarding "profits accruing" should be given effect under the implementing 1979 Trade Agreements Act in order to ensure conformity with the Code, it would not follow that the *1921* Act provision here in question should be interpreted so as to conform with the Code. *Cf. United States* v. *Philadelphia National Bank,* 374 U.S. 321, 348–49 (1963) (views of a subsequent Congress form a hazardous basis for inferring intent of an earlier one); *Giardino* v. *Commissioner,* 776 F.2d 406, 409 (2d Cir. 1985) (court would not venture beyond clear meaning of statute because, although clear meaning was contradicted by subsequent legislative history, it did not result in absurdity). In addition, legislative history indicates that Congress, in passing the 1979 Act, intended to preserve the status quo as to all administrative practice regarding the antidumping laws except where specifically noted. *See* S. Rep. No. 249 at 93, 107, *reprinted in* 1979 U.S. Code Cong. & Ad. News at 479, 493; *Brother Industries, Ltd.* v. *United States,* 3 CIT 125, 136, 540 F. Supp. 1341, 1353–54 (Senate Finance Committee did not disapprove the current regulations and administrative practice under the 1921 Act, but in effect preserved the status quo), *aff'd sub nom. Smith-Corona Group* v. *United States,* 713 F.2d 1568 (Fed. Cir. 1983), *cert. denied,* 465 U.S. 1022 (1984); *cf. Lorillard* v. *Pons,* 434 U.S. 575, 580 (1978) (Congress is presumed to be aware of administrative or judicial interpretation of a statute).

In short, although Timken raises provocative questions regarding the appropriateness of an antidumping law that conflicits in part with the law of our trading partners in a manner detrimental to United States industry, it has presented no basis for interpreting section 204 in light of the International Antidumping Code provision.

5. Non-absurdity of Results

Finally, Timken argues that unless section 204 is interpreted so as to require the deduction of profits as well as commissions, the consequence is an absurd result, inconsistent with the underlying purpose of the provisions regarding ESP. Thus, Timken points out that if profits are not deducted from ESP, dumping margins may differ substantially depending upon whether a foreign manufacturer elects to sell in the United States through (1) an agent selling the merchandise on consignment and receiving a commission, or (2) through a subsidiary purchasing the imported merchandise and

then reselling it, earning a profit. Timken contends that in substance those import transactions are identical, and that Congress did not intend that the form of transactions could be structured to eliminate or reduce dumping margins.

Timken also notes that ESP is defined in such manner as to make it "[i]n substance, the net amount *returned to the foreign exporter.*" S. Rep. No. 16, 67th Cong., 1st Sess. 12 (1921) (emphasis added); *see Brother Industries, Ltd.* v. *United States,* 3 CIT at 141 n. 13, 540 F. Supp. at 1357 n.13. According to Timken, if profits are not deducted from ESP, ESP will equal "the net amount returned to the foreign exporter" *plus* the subsidiary's profit, and so will be in conflict with this underlying definition. However, Congress could reasonably have determined that a foreign exporter and its United States subsidiary should be treated as one "pocket" for purposes of determining what net amount is "returned to the foreign exporter." Indeed, the very nature of ESP calculation, requiring the deduction from an arm's length resale price of readily verifiable amounts, indicates that in the context of ESP calculation Congress wished to stay away from any assessment of the legitimacy or significance of monetary transactions between related parties. Certainly it is possible, as Timken itself points out, that related corporations could show profit in whatever place—the United States or abroad—was most convenient for them. The fact that such manipulation is theoretically possible is a reasonable basis for including in "net amount returned to the foreign exporter" the profit going to *both* the foreign exporter and to its United States subsidiary.

Another reason for permitting a subsidiary's *profit* on resale of imported goods to *increase* ESP—in effect, treating a subsidiary's profit as part of the "net amount returned to the foreign exporter"—is that, regardless of how the word "commissions" is interpreted, any *loss* incurred by a subsidiary will *decrease* ESP—in effect, decreasing the "net amount returned to the foreign exporter." Congress could reasonably have determined that because, for purposes of calculating ESP, a foreign exporter and its subsidiary are effectively treated as one unit when the subsidiary has incurred a loss, that those parties should similarly be treated as one unit when the subsidiary has made a profit. A statutory scheme under which profit is not deducted from ESP is therefore hardly absurd. Consequently, the ITA's interpretation of the word "commissions" to mean only commissions, and not "commissions and profits," is reasonable.

B. *Cost-value Relationship*

Timken contends that the ITA erred in making adjustments for differences in circumstances of sale based on the *costs* of those differences.

In determining whether goods have been sold in the United States at less than fair value, the ITA must compare the United States price of the goods with the foreign market value of identical

or similar goods. However, United States price and foreign market value may differ for reasons that do not implicate the fairness of the foreign trade practices of the exporter. For example, foreign market value and United States price may be influenced by differences in the chain of commerce by which the goods reached the export or domestic market. Accordingly, in comparing foreign market value with United States price, the ITA must adjust foreign market value for differences in the circumstances of sale of the goods.

Section 202 of the 1921 Act provided in part:

> (c) in determining the foreign market value * * * if it is established to the satisfaction of the Secretary or his delegate that the amount of any difference between the exporter's sales price and the foreign market value (or that the fact that the exporter's sales price is the same as the foreign market value) is wholly or partly due to—
>
> * * * * * * *
>
> (2) other differences in circumstances of sale * * *.
>
> * * * * * * *
>
> then due allowance shall be made therefor.

Antidumping Act of 1921, § 202, 19 U.S.C. § 161 (1976). An implementing regulation provided:

> In determining the amount of the reasonable allowances for any differences in circumstances of sale, the Secretary will be guided primarily by the *cost* of such differences to the seller but, where appropriate, may also consider the effect of such differences upon the market value of the merchandise.

19 C.F.R. § 153.10(c) (1979) (emphasis added). In *Smith-Corona Group* v. *United States*, 713 F.2d 1568 (Fed. Cir. 1983), *cert. denied*, 465 U.S. 1022 (1984), the Federal Circuit upheld a regulation virtually identical to section 153.10(c). There Smith-Corona contended that the preference for cost established by the regulation is inconsistent with the underlying statutory requirement that claimed differences of sale must result in differences in price or value—not cost. The court rejected the argument on the ground that the assumption underlying the regulation—that differences in price or value are very likely to exist where there are differences in cost—was reasonable. 713 F.2d at 1577. The court noted that precluding the ITA from making that assumption would require it to engage in "extensive complex econometric analysis," and that making such an assumption "may be the only *practical* way to administer the statute." *Id.* at 1577 n.27 (emphasis in original). Yet, in language now relied upon by Timken, the court also stated:

> The Secretary may not, however, rely on cost *to the exclusion* of its effect on value. The regulation does not *prohibit* reli-

ance on value, but merely expressed a preference for cost; value may be considered where appropriate.

Id. at 1577 (emphasis in original). The court further stated:

> We do not hold that the Secretary may blindly rely on cost to the exclusion of its effect on value * * *. [*A*]*bsent evidence that costs do not reflect value,* the Secretary may reasonably conclude that cost and value are directly related.

Id. at 1577 n.26 (emphasis added).

In this case, the ITA made adjustments for differences in circumstances of sale based upon cost information. Timken claims that those adjustments were unwarranted because it had presented evidence to the ITA that the differences in cost did not in fact result in a difference in the value of the goods. The evidence thus referred to is data showing that when certain costs *increased,* including those costs reflecting differences in circumstances of sale, the price of foreign market goods in many cases *decreased* or stayed the same. According to Timken, in only a few instances did prices rise in conjunction with a rise in costs. Hence, Timken argues, it is clear that the costs reflecting differences in circumstances of sale did *not* increase the value of the goods and therefore foreign market value should not have been adjusted to reflect those costs. In so arguing, Timken relies upon the *Smith-Corona* language: "*absent evidence that costs do not reflect value,* the Secretary may reasonably conclude that cost and value are directly related." *Id.* (emphasis added).

In effect, Timken's position is that the data establishing that as certain costs went up, price went down or stayed the same, constitutes evidence that "costs do not reflect value," and so makes unreasonable the ITA's usual assumption that costs are reflected in value. The court disagrees. The ITA's assumption, reflected in its regulation, of a relation between cost and value, does not hold good only in cases in which there is a positive correlation between prices and specific costs. Prices are influenced by many factors other than costs, *e.g.,* market demand, competition, and volume of sales. Furthermore, where the costs in question are not total costs, but merely costs of differences in circumstances of sale, such additional factors may well have a proportionately greater impact on price than do increases in those costs. Thus, costs of differences in circumstances of sale may be directly related to value and yet not control final price. Given this, Timken's evidence that prices did not increase with the rise in certain costs did not establish that values did not increase together with those cost increases; it at most established that values and/or prices were influenced by other factors as well.

Timken contends also that once it had presented data showing the absence of a positive correlation between costs and prices, it became incumbent upon NTN to rebut that evidence by affirma-

tively establishing that cost did indeed influence value. The argument is misplaced. The assumption of a cost-value relation implicit in the regulation and sanctioned by *Smith-Corona* is not a burden-shifting device. *See id.* It is rather an assumption embodying the informed judgment of an agency charged with the responsibility of administering the statute. Upon presentation of Timken's data on cost and price, the ITA's task was to determine whether, in light of that evidence, its assumption of a positive relation between cost and value *continued* valid. The ITA decided that it did, and the court finds that decision reasonable. For, as discussed above, prices may be influenced by many factors, so that an assumption that higher costs result in higher values is not undermined by the fact that certain relatively small cost increases do not coincide with price increases.[10]

V. *Conclusion*

This action is remanded to the ITA for (1) collection and review of data for a period extending up to the date of the ITA's preliminary determination; (2) collection and review of additional home market sales data for the period of time already reviewed by the ITA, and for reassessment of proper TRB model comparisons; (3) review of the accuracy of all pertinent NTN production costs; (4) correction of all errors that may have occurred below; and (5) recalculation of dumping margins in a manner consistent with this opinion. The ITA is directed to report its findings to the court within one hundred twenty (120) days of the date of this order.

(Slip Op. 86–18)

DONNA KELLEY, ET AL., PLAINTIFFS *v.* SECRETARY, U.S. DEPARTMENT OF LABOR, DEFENDANT

Court No. 85–03–00437

OPINION AND ORDER

[Motion for certification for interlocutory appeal denied.]

(Decided February 20, 1986)

Donna Kelley, pro se.

Richard K. Willard, Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch, *Platte B. Moring, III,* Civil Division, United States Department of Justice, for defendant.

[10] The court has considered the remaining contentions of the parties and finds either that they are without merit, or that the court's determination to remand this action makes those contentions either moot, or not appropriate for consideration at this time. *See Ford Motor Co.* v. *NLRB,* 305 U.S. 364, 372–76 (1939) (it is familiar appellate practice to remand causes for further proceedings without deciding the merits, where justice demands that course in order that some defect in the record may be remedied).

RESTANI, *Judge:* Defendant has moved for certification of the statute of limitations issue as resolved by the court in Slip Op. 85–132, Court No. 85–03–00437. Before addressing the issue raised here, the court believes clarification of the court's decision on the statute of limitations may be helpful. Defendant asserts in its motion for certification that plaintiff-Kelley, and presumably her co-plaintiffs, did not appear before the Secretary of Labor as a petitioner in the investigation leading to denial of eligibility to apply for trade adjustment assistance. Although this appears from the administrative record to be the case, plaintiffs filed their action with this court to contest the Secretary's denial of the petition for eligibility and, therefore, plaintiff-Kelley and her co-plaintiffs stand in the shoes of the actual petitioners.[1] The petition for trade adjustment assistance lists three workers as petitioners and provides the name of the workers' representative by whom the petition was to be filed. Each of these four individuals signed the petition and their respective addresses were provided. Plaintiff alleged and defendant did not deny that Catherine McLeroy, one of the three worker-petitioners, received actual notice of the Secretary of Labor's denial of the petition on February 18, 1985.[2] There has been no indication that any of the other three petitioners received actual notice on an earlier date. Thus, the court determined that February 18, 1985, under the specific circumstances of this case, marks the beginning of the running of the statute of limitations. Thus, although there may be a suggestion in the court's original opinion that plaintiff-Kelley was an actual petitioner, the court concludes that this has no impact on the court's decision in Slip Op. 85–132.

In addition, defendant notes that plaintiff-Kelley knew that the Secretary of Labor's investigation of the petition would probably take six months to complete. That the Department of Labor is apparently unable to comply with the statutory sixty day time period for issuing determinations on such petitions, 19 U.S.C. § 2272 (1982 & Supp. I 1983), may support the need for Congress to amend the requirements of the statute. Informing petitioners of the approximate number of months that an investigation will take to complete, however, is not the same as telling the petitioners exactly when a determination will be issued and is not a substitute for compliance with section 2272. Such a general notification cannot remove the potential procedural consequences of a failure to

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[1] The statute does not limit the parties entitled to challenge the Secretary of Labor's determination on a petition for eligibility to apply for trade adjustment assistance to those who filed the petition. Rather, the statute provides:

> A worker, group of workers, certified or recognized union, or authorized representative of such worker or group aggrieved by a decision of the Secretary of Labor under section 2273 of this title * * * may, within sixty days after notice of such determination, commence a civil action in the United States Court of International Trade for review of such determination.

19 U.S.C. § 2395(a) (1982).

There has been no question raised as to plaintiff-Kelley's status as a "worker" within the meaning of the statute, and her standing to bring suit is unaffected by whether she was a petitioner.

[2] Plaintiff-Kelley, too, received notice on that date.

comply with the statute and relevant regulations concerning notice procedures.

Finally, defendant notes that in *Brunelle* v. *Donovan,* 3 CIT 76 (1982), this court dismissed plaintiff's action for failure to comply with the statute of limitations despite the Secretary of Labor's delinquent issuance of its final determination on the petition for trade adjustment assistance. The court in *Brunelle,* however, did not specifically address the issue of the timeliness of the Secretary's determination and gave no indication that it even considered the issue. Thus, *Brunelle* is not persuasive as to the potential procedural consequences of a late determination.

To certify an issue for interlocutory appeal requires a showing that "a controlling question of law is involved with respect to which there is substantial ground for difference of opinion *and* that an immediate appeal from [the court's] order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(d)(1) (West Supp. 1985) (emphasis added). Interlocutory appeals are to be used only in those exceptional cases that are likely to require lengthy or expensive proceedings. *See National Corn Growers Association* v. *James A. Baker, III,* 9 CIT ——, Slip Op. 85-119 at 21-22 (Nov. 26, 1985); *C.L. Hutchins & Co., Inc.* v. *United States,* 67 Cust. Ct. 354, 358, C.D. 4297, 334 F. Supp. 188, 191 (1971). Defendant offers no facts to support the claim of the Office of Trade Adjustment Assistance that the court's remand order will require a rather lengthy investigation and the expenditure of more than a minimal amount of government resources. The court is not convinced that the burden imposed on defendant in carrying out the court's remand order, in terms of time or expense, is of such magnitude as to justify certification for interlocutory appeal. *See National Corn Growers,* Slip Op. 85-119 at 22 (indicating certification inappropriate where issues raised do not "portend a protracted trial"); *C.L. Hutchins,* 67 Cust. Ct. at 358, 334 F. Supp. at 191-92 (certification denied where proceedings not likely to be "expensive" or "protracted"). In this case, no trial is called for and the court is unable to conclude from defendant's conclusory statement that compliance with the remand order will require anything but ordinary administrative steps of a not particularly burdensome nature.

The normal course is to let litigation proceed on its own until termination by action of the parties or until a final court decision is reached. Interlocutory appeals have their own potential for delay. Therefore, certification should not be permitted unless the court is convinced that the proceedings sought to be avoided would be protracted or expensive. *See Milbert* v. *Bison Laboratories,* 260 F.2d 431, 433 (3d Cir. 1958) (discussing parallel interlocutory appeal provision applicable to federal district courts) (cited in *Caldwell* v. *Chesapeake & Ohio Railway Co.,* 504 F.2d 444, 446 (6th Cir. 1974); *Kraus* v. *Board of County Road Commissioners,* 364 F.2d 919, 922 (6th Cir. 1966)). Here, the potential for delay in termination of the

litigation both in terms of the parties' interests and in terms of judicial economy dictates denial of defendant's motion for certification to file an interlocutory appeal and for stay of the court's order.

(Slip Op. 86-19)

TERUMO CORP., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 84-8-01089

Before DICARLO, *Judge.*

Plaintiff challenges classification of dialyzers used to filter and purify blood under item 709.17 of the Tariff Schedules of the United States (TSUS), arguing that the merchandise is classifiable under item 661.95, TSUS. Defendent moves for summary judgment.

Held: Medical dialyzers are properly classified under Schedule 7, Part 2, Subpart B, TSUS, rather than under a provision describing nonmedical merchandise.

[Defendant's motion is granted.]

(Decided February 21, 1986)

Stein Shostak Shostak & O'Hara (Robert Glenn White) for the plaintiff.

Richard K. Willard, Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Field Office, Department of Justice (*Saul Davis*), for the defendant.

MEMORANDUM OPINION AND ORDER

DICARLO, *Judge:* Plaintiff challenges the United States Customs Service (Customs) classification of merchandise invoiced as "Clirans Hollow Fiber Dialyzers" under item 709.17 of the Tariff Schedules of the United States (TSUS) as "Electro-medical apparatus, and parts thereof: * * * Other." Plaintiff claims that the dialyzers are properly classifiable under item 661.95, TSUS, as "filtering and purifying machinery and apparatus * * * for liquids or gases * * * and parts thereof * * * other."

Defendant moves for summary judgment. The parties agree that the dialyzers are used for medical purposes in the filtering and purifying of blood and that there are no questions of fact which prevent the Court from deciding the motion. Defendant's motion is granted.

Defendant asserts that item 661.95, TSUS, comes under Headnote 1(v) to Schedule 6, Part 4, TSUS, which states: "This part does not cover— * * * articles and parts of articles specifically provided for elsewhere in the schedules." Defendant argues that the dialyzers are specifically provided for under item 709.17, TSUS, as other electro-medical apparatus. Further, says defendant, even if item 709.17, TSUS, is not a specific provision within the meaning of Headnote 1(v), the merchandise is still properly classified under that provision.

Plaintiff contends that item 709.17, TSUS, is a broad tariff provision which does not provide "specifically" for the dialyzers within the meaning of Headnote 1(v) to Schedule 6, Part 4. Plaintiff admits that the merchandise comes within the description of item 709.17, TSUS, but argues that item 661.95, TSUS, is more specific. It also argues that the Brussels Nomenclature [1] indicates Congressional intent that dialyzers be classified under item 661.95, TSUS, as filtering and purifying machinery.

The Court holds that the specificity of the competing provisions does not control since Congress intended that medical dialyzers be classified under Part 2 of Schedule 7. "[T]he basic rule of construction of a statute is that the intent of Congress is to be given effect and all other rules of construction must yield * * *." *S & T Imports, Inc.* v. *United States*, 78 Cust. Ct. 45, 49, C.D. 4690 (1977). The Court may look to the intent of Congress when "not entirely certain of the meaning of the statutory language when applied to the particular facts of this case." *Rikfin Textiles Corp.* v. *United States*, 54 CCPA 138, 142, C.A.D. 925, *cert. denied*, 389 U.S. 931 (1967).

The *Explanatory Notes* to the Brussels Nomenclature are a source for ascertaining legislative intent, where the language of the Brussels Nomenclature and the TSUS are similar. *See Toyota Motor Sales, U.S.A., Inc.* v. *United States*, 7 CIT ——, 585 F. Supp. 649, 655 (1984), *aff'd*, 753 F.2d 1061 (Fed. Cir. 1985). Items 661.95 and 709.17 of the TSUS are similar to Headings 84.18 and 90.17 of the Brussels Nomenclature. *See Pharmacia Fine Chemicals, Inc.* v. *United States*, 7 CIT ——, 585 F. Supp. 649, 655 (1984), *aff'd*, 753 F.2d 1061 (Fed. Cir. 1985); *Nippon Kogaku (U.S.A.), Inc.* v. *United States*, 1 CIT 328, 521 F. Supp. 466 (1981).

Plaintiff contends that the dialyzers are classifiable under item 661.95, TSUS, since the *Explanatory Notes* state regarding Brussels Heading 84.18:

> The heading also covers dialysers, special type filters consisting essentially of a semi-permeable membrane through which liquids can pass by diffusion and thus be separated from colloidal particles.

This note, which refers to dialyzers generally, does not indicate that Heading 84.18 covers dialyzers that are chiefly used for medical purposes.[2]

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[1] Customs Co-Operation Council, *Nomenclature for the Classification of Goods in Customs Tariffs* (1955) (Brussels Nomenclature), and *Nomenclature-Explanatory Notes* (1955).

[2] *Webster's Third New International Dictionary* defines the following terms:

dialyzer: an apparatus in which dialysis is carried out consisting essentially of one or more containers for liquids separated into compartments by membranes in any of various forms (as a sheet, bag or tube).

dialysis * * * 1: the separation of substances in solution by means of semipermeable membranes (as of parchment, cellophane, or living cells) through which the smaller molecules and ions diffuse readily whereas the larger molecules and collodial particles diffuse very slowly or not at all, such separations being important in nature (as in living organisms and in soils) and having many applications (as in blood) fractionation or in the recovery of sodium hydroxide in the manufacture of viscose)—used esp. of the separation of noncolloids from colloids (as proteins); * * * 2 bot: the separation of parts which are normally united esp. in the same floral whorl.

The *Explanatory Notes* description of Brussels Heading 90.17 indicates that articles described by a term which may be used to describe both medical and nonmedical apparatus should be classified under the heading which describes the term in its general meaning only where the articles in question are not identifiable as being for medical use:

> This heading covers a very wide range of instruments and appliances which, in the vast majority of cases, are used only in professional practice (e.g., by doctors, surgeons, dentists, veterinary surgeons, midwives, etc.), either to make a diagnosis, or * * * to carry out some treatment on the patient.
>
> * * * * * * *
>
> It should be noted that a number of the instruments used in medicine and surgery (human and veterinary) are, in effect, tools * * *. Such articles are classified in the present heading only when they are clearly identifiable as being for medical or surgical use * * *.

Therefore, while nonmedical dialyzers might come under Brussels Heading 84.18, medical dialyzers would be classified under heading 90.17.[3] To the extent that the *Explanatory Notes* are relevant, they support Customs classification.

The intent of Congress is more explicitly shown in the *Tariff Classification Study*. "The *Tariff Classification Study*, published by the United States Tariff Commission pursuant to Congressional delegation (Customs Simplification Act of 1954, Public Law 83-768, 68 Stat. 1136), is regarded by the court as a source of legislative history of the TSUS." *Certified Blood Donor Services, Inc.* v. *United States*, 62 CCPA 66, 69 n.2, C.A.D. 1147, 511 F. 2d 572, 575 (1975).

The *Tariff Classification Study* says that Schedule 7, Part 2, Subpart B, entitled "Medical and Surgical Instruments and Apparatus," which contains item 709.17, encompasses medical instruments and appliances which previously were spread among seven of the schedules of the Tariff Act of 1930.

> This subpart covers a wide variety of instruments and appliances used generally in professional practice for diagnosis, prevention, and treatment of diseases, the correction of deformities and defects, the repair of injuries, etc. These articles are presently dutiable at a number of different rates in a number of widely separated paragraphs in seven of the present tariff schedules. In assimilating the various provisions for these closely related instruments and appliances into this subpart, articles imported in significant quantities have been provided for wherever possible at the existing rates of duty * * *.

9 *Tariff Classification Study*, at 144-46.

[3] Headnote 1(e) to chapter 84 of the Brussels Nomenclature provides further indication that medical dialyzers would be classified under heading 90.17. The headnote states: "This section does not cover * * * articles falling within chapter 90."

Plaintiff's proposed classification, item 661.95, TSUS, is contained in Schedule 6 of the TSUS, entitled "Metals and Metal Products." Its predecessor, Schedule 3 of the Tariff Act of 1930, entitled "Metals and Manufactures of," was one of the seven schedules from which Schedule 7, Part 2, Subpart B was assimilated.[4]

Schedule 6, Part 4 of the TSUS was intended to cover general-purpose articles rather than medical equipment. Subpart A, which includes item 661.95, TSUS, is entitled "Boilers, Non-Electric Motors and Engines, and Other General-Purpose Machinery." The Tariff Classification Study states:

> This subpart covers a wide variety of machinery and appliances which can be used in numerous industrial applications as set forth in headnote 1 to this subpart. * * * The systematic grouping of general-purpose machines and appliances in this subpart, together with the rule expressed in the headnote, would provide greater stability to the product classifications.

8 *Tariff Classification Study,* at 260. Nothing in the *Tariff Classification Study* indicates that medical equipment is classifiable under item 661.95, TSUS.[5]

The Court concludes that Schedule 6, Part 4 of the TSUS does not provide for the classification of medical dialyzers which are properly classified under Schedule 7, Part 2, Subpart B of the TSUS.

After considering the undisputed facts, the relevant portions of the TSUS, and the intent of Congress, the Court concludes that medical dialyzers fall within Schedule 7, Part 2, Subpart B of the TSUS, and that they are properly classified within that subpart under item 709.17, TSUS.[6] Judgment will be entered accordingly. So ordered.

(Slip Op. No. 86-20)

KENDA RUBBER INDUSTRIAL CO., LTD., ET AL., PLAINTIFFS *v.* UNITED STATES, DEFENDENT

Court No. 84-7-00949

Before CARMAN, *Judge.*

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[4] *See* 9 *Tariff Classification Study,* at 144. The predecessor provisions to the items contained in Schedule 7, Part 2, Subpart B indicate that this subpart was assimilated from schedules 2, 3, 4, 9, 12, 13, and 15 of the Tariff Act of 1930. *See id.* at 102-03.

[5] The *Tariff Classification Study* lists as predecessor provisions to item 661.95, TSUS, paragraphs 353, 360 and 372 of the Act. 8 *Tariff Classification Study* at 243, 263. Insofar as any medical instruments might previously have been classified under those paragraphs, such articles are currently provided for under Subpart B to part 2 of Schedule 7, since paragraph 360 is cited as a predecessor to item 790.07, TSUS, and paragraph 372 as predecessor to items 709.40 and 709.45, TSUS.

Although paragraph 353 of the Tariff Act of 1930 refers to certain therapeutic and diagnostic apparatus, it provided for non-medical articles as well. Since paragraph 353 is cited as a predecessor provision to item 709.17, as well as item 709.40, 709.45, 709.50, and 709.61-70, TSUS, it is apparent that Congress intended that the portion of that paragraph relating to medical articles be succeeded by provisions contained in Schedule 7, and that the portion relating to non-medical articles be succeeded by provisions contained in Schedule 6.

[6] The Court need not, and does not, address defendant's argument that item 709.17, TSUS, is a provision which describes dialyzers "specifically" within the meaning of Headnote 1(v) Schedule 6, Part 4.

[Judgment for defendant.]

(Decided February 24, 1986)

Myron Solter for the plaintiff.

Lyn M. Schlitt, General Counsel, *Michael P. Mabile,* Assistant General Counsel, and *Brenda A. Jacobs,* United States International Trade Commission, for the defendant.

CARMAN, *Judge:* Before the Court is plaintiffs' motion for judgment upon the agency record, pursuant to Rule 56.1, in this antidumping investigation. Defendant United States opposes the motion. Plaintiffs ask for a review of the International Trade Commission's (Commission) determination in *Bicycle Tires and Tubes from Taiwan,* U.S.I.T.C. Public. 1532, Investigation No. 731-TA-166 (Final) (May 1984), that imports of bicycle tires and tubes from Taiwan are materially injuring industries in the United States.

Plaintiffs challenge the Commission's determination on basically two grounds. First, plaintiffs contend that the Commission improperly found injury to the separate tire and tube industries on the basis of aggregated data. Second, plaintiffs claim that a majority of Commission members based their determination on a period six to nine years before the date of the determination, and that the use of such a period contravenes the language of the relevant statute. Use of the earlier period, plaintiffs claim, made it impossible to determine whether the dumping caused the injury, and a determination based on that period, when applied to present entries, operates as an unlawful penalty. For the reasons given below, the Court sustains the Commission's determination.

BACKGROUND

Before outlining the facts of this case, it may be useful to examine the procedures followed in an antidumping investigation, since much of the controversy in this case arises from a disjointed procedure that resulted from a court remand. To initiate an antidumping investigation, an interested party files a petition with the administering authority, the United States Department of Commerce (Commerce) [1] and simultaneously with the Commission, alleging the sale of imports at less than fair value (LTFV). 19 U.S.C. § 1673a(b) (1982). Within 20 days Commerce determines whether to initiate an investigation and informs the Commission of its determination. If Commerce decides to initiate an investigation, the Commission makes a preliminary determination of whether there is a reasonable indication that the alleged LTFV sales are injuring or threatening to injure a domestic industry. 19 U.S.C. § 1673b(a). If the Commission's determination is affirmative, Commerce conducts an investigation and arrives at a preliminary determination of

[1] The administering authority is currently Commerce, but at the time of the initial investigation in this case it was the Department of Treasury. The administering authority may also initiate its own investigation. 19 U.S.C. § 1673a(a) (1982).

whether there have been LTFV sales. 19 U.S.C. § 1673b(b). Commerce then performs a complete investigation and arrives at a final determination. 19 U.S.C. § 1673d(a). Finally, if Commerce's final determination is affirmative, the Commission performs its complete investigation and makes its final determination of whether the LTFV sales materially injure or threaten to injure a domestic industry. *Id.* at § 1673d(b). The statutory scheme involves a series of interlocking steps by the agencies, the next step of each dependent upon the prior step of the other. The statute clearly contemplates that each step will follow close upon the other, mandating a period of days for the completion of each step. From filing of the petition to the Commission's final injury determination should take 230 days, if verification is waived (*see* 19 U.S.C. § 1673b(b)(2)), to at most 420 days in an extraordinary complicated case (*see* 19 U.S.C. § 1673b(c)).

In this case the administering authority at the time, the United States Department of Treasury (Treasury), made a negative final determination as to LTFV sales, which the petitioner appealed. Upon remand the new administering authority, Commerce, made an affirmative final determination, and the Commission then made an affirmative injury determination, serveral years after Treasury's initial investigation. It is the Commission's determination that plaintiffs now challenge. A more detailed history of the case follows.

In January 1978 Carlisle Tire & Rubber Co. filed a petition with Treasury alleging LTFV sales of bicycle tires and tubes from Taiwan. In December 1978 Treasury made a negative final determination of LTFV sales [2] and Carlisle appealed to this court's predecessor, the United States Customs Court. In May 1982 the court remanded that case, Court No. 79-3-00513, instructing that a different methodology be used to calculate dumping margins.

While that case was under advisement, Carlisle filed a new petition again alleging LTFV sales of bicycle tires and tubes from Taiwan. The Commission conducted a preliminary investigation and determined that there was a reasonable indication that the alleged dumping was injuring a domestic industry. U.S.I.T.C. Public. 1258, Investigation No. 731-TA-94 (Preliminary) (June 1982). In May 1983, however, Commerce made a final negative determination regarding LTFV sales occurring between December 1, 1981 and May 31, 1982. Carlisle's appeal of that determination to this court was designated Court No. 83-5-00773.

In October 1983 Commerce issued its redetermination in the remanded 1978 investigation, finding LTFV sales, and referred the case to the Commission for an injury determination. *See* 49 Fed. Reg. 2492 (1984). At this juncture Carlisle settled its appeal of the 1982 determination, on the basis of Commerce's affirmative rede-

[2] Because Carlisle filed its petition prior to passage of the 1979 Trade Agreements Act, Treasury did not refer the case to the Commission for a preliminary injury determination.

termination in the 1978 case, and the court issued an order dismissing the appeal.

In January 1984 the Commission began its final injury determination in the 1978 case. The Commission sent a questionnaire to Carlisle [3] and to importers and purchasers of imported bicycle tires and tubes, seeking data for the period 1981–1983. During the investigation the Commission also determined that it had in its files data on the domestic industry and imports dating from 1973. The data had been collected in a 1978 investigation under section 201 of the Trade Act of 1974, preliminary antidumping and countervailing duty investigations in 1982, and a 1983 review investigation under section 104 of the Trade Agreements Act of 1979. The Commission determined that the data from these investigations were calculated on the same basis as the data in the ongoing investigation. It therefore incorporated some of the tables and the staff reports from the prior investigations into the record in the ongoing investigation.

Controversy arose during the investigation as to which time period the Commission should examine to determine injury—the period of the initial investigation, around 1978, or the "present" period, 1981–1983. Carlisle argued that the earlier period was appropriate, while the Taiwanese respondents argued for the present period. The Commissioners did not reach a unanimous decision on which time period to use, though whichever period each used, all of them found that the domestic industry was injured by LTFV sales of imports. Commissioners Stern, Haggart, and Rohr based their decision on the period 1975–1978, U.S.I.T.C. Public. 1532, at 3 n.1, although Commissioner Haggart also noted that she had considered the 1981–1983 data and reached the same conclusion. *Id.* Then-Chairman Eckes and Commissioner Lodwick based their injury determination on the period 1975–1983. In January 1984 plaintiffs appealed the Commission's affirmative injury determination. That appeal is now before the Court.

OPINION

Plaintiffs raise a number of challenges to the Commission's determination, all of which fall into basically two categories. First, plaintiffs claim that the Commission improperly found injury to the separate tire and tube industries on the basis of aggregated data. Second, they claim that the determination was based upon data from the period 1975–1978 and that the use of this earlier time period was improper. Plaintiffs claim that in committing these two errors the Commission acted *ultra vires* and its determination is therefore void. An agency action is *ultra vires* when the agency has acted beyond the scope of its defined authority. In this case, the Commission conducted an investigation and issued a de-

[3] Defendant asserts, and plaintiff does not contest, that Carlisle was the only domestic producer of bicycle tires and tubes. *See* Defendant's Brief at 6.

termination within the confines of its statutorily granted authority. Plaintiffs present no evidence that the Commission exceeded that authority. The Court's review of agency determinations in such a case is governed by 19 U.S.C. § 1516a(b)(1)(B) (1982). Thus, under that statute, the issues in this case are whether the Commission's determination is "unsupported by substantial evidence on the record, or otherwise not in accordance with law" (1) because the agency based its determination of injury to the separate tire and tube industries on data that was not segregated for, 1975–1978 as to the profits for each industry, and (2) because the agency based its determination on an improper time period.

A. *Separate Injury Based on Aggregated Profits Data*

The Commission found that the bicycle tire and bicycle tube industries were separate industries, and that each was separately injured by reason of LTFV imports. U.S.I.T.C. Public. 1532, at 8, 15. To reach this determination, the Commission relied on data in its files compiled in part from previous investigations. *Id.* at 6. For the period 1979–1983 the Commission had before it segregated data regarding all relevant aspects of the domestic industries, including profits data. For the period 1975–1978 the Commission had segregated data on all relevant aspects of the domestic industries except profits. Nothing in the record of the investigation indicates that the Commission made any attempt to obtain segregated profits data for 1975–1978.

Under the appropriate standard of review, the first question the Court must address is whether the Commission acted in accordance with law when it failed to request segregated profits data from Carlisle for the period 1975–1978. In other words, did the Commission have an affirmative duty to attempt to obtain this data? The Court finds that the relevant statute should not be read so strictly as to impose upon the agency an affirmative duty to obtain segregated profits data.

The controlling statute is 19 U.S.C. § 1677 (1982), which contains definitions and special rules governing both countervailing duty and antidumping investigations. In determining "material injury" to a domestic industry, the Commission is required to consider the impact of the LTFV imports on the domestic industry, and is further required to "evaluate all relevant economic factors which have a bearing on the state of the industry, including, but not limited to * * * profits. 19 U.S.C. § 1677(7)(C)(iii)(I) (1982). Thus to determine whether there is material injury to an industry, the Commission must look at a variety of factors, including profits. The statute further instructs the Commission to determine injury for like products separately, where possible.

> The effect of subsidized or dumped imports shall be assessed in relation to the United States production of a like product if available data permits the separate identification of production

> in terms of such criteria as the production process or the producer's profits.

19 U.S.C. § 1677(4)(D) (1982).

Plaintiff would have the Court construe these provisions to require the Commission to seek separate profits data in every instance where more than one industry is affected. Although ideally an investigation would include such data, neither the legislative history of the statute nor the cases construing it require such a strict reading. The Senate Report accompanying the 1979 amendment that added the present section 1677 indicates that the Commission is to consider a variety of factors relating to each separate product where separate consideration is reasonable.

> In examining the impact of imports on the domestic producers comprising the domestic industry the ITC should examine the relevant economic factors (such as profits, productivity, employment, cash flow, capacity utilization, etc.), as they relate to the production of only the like product, if available data permits a reasonably separate consideration of the factors with respect to production of only the like product.

S. Rep. No. 249, 96th Cong., 1st Sess. 83–84 (1979). This Court had occasion to examine this passage of the Senate Report in *Roquette Freres* v. *United States,* 7 CIT ——, 583 F. Supp. 599 (1984). After quoting this passage the Court stated, "It is incumbent on the ITC to acquire all obtainable or accessible information from the affected industries on the economic factors *necessary for its analysis.*" 583 F. Supp. at 604 (emphasis added). Congress did not intend to require the Commission to obtain separate data on every enumerated economic factor; rather, it directed the Commission to obtain such data, where possible, as allows it to make "a reasonably separate consideration."

That the statute does not require the Commission to seek separate data for every factor is supported by the analogous case of *Atlantic Sugar, Ltd.* v. *United States,* 744 F.2d 1556 (Fed. Cir. 1984) (*rev'g* 4 CIT 248, 553 F. Supp. 1055 (1982)). That case involved a final injury determination in which the Commission considered impact on regional industries. *See* 19 U.S.C. § 1677(4)(C) (1982). One producer claimed it was unable to provide segregated data for each of its plants, and therefore could not provide data segregated by region. The Commission accordingly applied the "best information" rule, which allows it to use the best information available when a party is unable or refuses to produce requested information. *See* 19 U.S.C. § 1677e(b) (1982). This court found that the Commission's use of the aggregated data was improper, stating that the Commission could not consider data from outside the regional boundaries it had established. *Atlantic Sugar, Ltd.* v. *United States,* 4 CIT 248, 250, 553 F. Supp. 1055, 1058 (1982).

The Court of Appeals for the Federal Circuit reversed on this point. It found that the Commission was not required to obtain

completely segregated data. 744 F.2d at 1562. Instead, the court examined the entire record to determine whether the conclusions the Commission drew from the data were supported by substantial evidence on the record. *Id.*[4] That is the issue that must now be addressed in the instant case.

The "substantial evidence" standard of review has been well explicated in many decisions. *See Carlisle Tire and Rubber Co.* v. *United States,* 9 CIT ——, 622 F. Supp. 1071 (1985). Review of the agency determination is limited, ensuring that agency conclusions are reasonably drawn from some evidence, more than a mere scintilla, in light of the record as a whole. Applying this standard to the Commission's determination of injury to the bicycle tire and tube industries, the Court finds that there is sufficient evidence in the record from which a reasonable mind might draw the conclusions that the Commission drew.

The Commission had before it segregated data for bicycle tires and tubes regarding domestic shipments, production, exports, consumption, capacity, manufacturing costs, prices, inventories, employment, as well as imports for consumption. The Commission also had aggregated data for profits, and segregated data for profits from 1979 forward. The Court finds that this was sufficient data from which the Commission could conclude that the domestic industries were injured during the period 1975–1978.

B. *The Time Period of the Investigation*

The statute under which the Commission makes its injury determination provides in relevant part:

> The Commission shall make a final determination of whether an industry in the United States is materially injured, or is threatened with material injury * * * by reason of imports of the merchandise with respect to which the administering authority has made an affirmative determination under subsection (a)(1) of this section.

19 U.S.C. § 1673d(b)(1). Plaintiffs contend that this statute requires the Commission to make a present determination of injury and that a majority of the Commission members erroneously based their determination on the period 1975–1978. Plaintiffs also con-

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[4] Plaintiffs also cite *Budd Co., Ry. Div.* v. *United States,* 1 CIT 67, 507 F. Supp. 997 (1980), to support their argument. That case involved a preliminary injury determination by the Commission, which the relevant statute requires be made based upon "the best information available." 19 U.S.C. § 1673b(a) (1982). The court construed the statute's command to mean that "all information that is 'accessible or may be obtained,' from whatever its source may be, must be reasonably sought by the Commission." 1 CIT at 75, 507 F. Supp. at 1003–04. The Commission in that investigation had obtained no data on domestic producers of components and parts, yet found that the domestic industry was not injured. The court held that this determination was not supported by substantial evidence in the record, and further found that the Commission had not conducted a thorough investigation as required by statute. *Id.* at 79, 507 F. Supp. at 1006. Thus the court implicitly found that the determination was not in accordance with law, as well as unsupported by substantial evidence.

Although the court in *Budd Co.* used broad language imposing a duty upon the Commission to obtain *all* information, the facts in that case clearly distinguish it from the instant case. There the Commission had gathered essentially no data. Here the Commission had data relating to each of the factors enumerated in the statute, including profits. Lack of certain segregated data might render a determination unsupported by substantial evidence, but it does not make the determination out of accordance with law.

tend that the Commission's use of the earlier period made it impossible to determine the requisite causal connection between the LTFV imports, and that the Commission's use of the earlier period when applied to present entries operates as an unlawful penalty.

Plaintiffs argue that the statute requires the Commission to look at the present period because of the present tense wording of the statute. Although the relevant section is cast in the present tense, the Court does not find this argument compelling. The statutory scheme contemplates that antidumping determinations will be made in a relatively short space of time, usually less than one year, from the time the petition is filed until the final injury determination is made. Thus Congress apparently intended the Commission's determination to follow hard upon Commerce's finding of LTFV imports. In a normal investigation, the present tense language of the statute anticipates that the Commission will examine a time period close to that examined by Commerce. In an unusual case such as this, the statutory scheme has been interrupted. Had Treasury originally found LTFV imports, the Commission would then have examined the earlier period. When this Court remanded to Commerce, it directed Commerce to reexamine the period of the original investigation. There is some logic in the Commission, too, examining that earlier period. Indeed in other cases where this court has remanded to the Commission, it has directed it to look at the early period it originally investigated. *See, e.h., Roquette Freres* v. *United States,* 7 CIT ——, 583 F. Supp. 599 (1984).

The court hesitates, however, to establish an absolute rule that would require the Commission to examine a period years earlier where Commerce finds LTFV imports in a remanded case. It may not always be possible for the Commission to obtain data regarding the earlier period. As the statute does not expressly command the Commission to examine a particular period of time, the Court finds that the Commission has discretion to examine a period that most reasonably allows it to determine whether a domestic industry is injured by LTFV imports.[5]

Plaintiffs further protest that by failing to determine injury during the present period, the Commission made it impossible to find the requisite causality between the injury and the LTFV imports. Plaintiff is correct that the Commission must find that the injury occurred "by reason of" the LTFV imports. This is precisely what the Commission found. *See* U.S.I.T.C. Public. 1532, at 15. Commerce's investigation covered the period September 1, 1977 through February 28, 1978. The Commission majority based its determina-

[5] The Commission's determination in this investigation is rather unusual in that the Commissioners were split over which time period was most appropriate. Three Commissioners considered the 1975–1978 period, while two based their decision on 1975–1983. Of the three who looked at 1975–1978, one said that she also considered the period 1981–1983, and that "she would have reached an affirmative determination based on the period 1981–83 as well." U.S.I.T.C. Public. 1532, at 3 n.l. The Commission's analysis accompanying the determination also discussed the entire period of 1975–1983. One could argue, then, as defendant does, that a majority of the Commission's members looked both at the 1975–1978 period, and at the later 1981–1983 period, which plaintiffs contend applies.

tion on the period 1975–1978. The Court concludes that it was both possible and reasonable for the Commission to determine that the injury it found was caused by the LTFV imports during the time of Commerce's investigation.

Plaintiff finally complains that the Commission's injury determination operates as an unlawful penalty because presumably it will lead to imposition of duties on entries made after 1982, when Commerce found in its later investigation that there were no LTFV imports. The only agency action that the Court is reviewing in this case is an injury determination by the Commission, not a final antidumping duty order issued by Commerce. The Commission's determination that the domestic industries are injured by reason of the LTFV imports found by Commerce does not operate as an unlawful penalty.

CONCLUSION

The Court finds that the Commission's use of aggregated profits data and its consideration of the 1975–1978 period are in accordance with law. Moreover, the Court finds the Commission's actions reasonable in light of the fact that the Commission had a wealth of data from this early period, and further finds the Commission's conclusion that LTFV imports were injuring a domestic industry is supported by substantial evidence in the record. The Commission's determination, being both supported by substantial evidence and in accordance with law, is therefore sustained.

ABSTRACTED CLASSIFICATI

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD
				Item No. and rate	Item No. an
C86/7	Carman, J. February 12, 1986	Donner Mountain Corp.	84-11-01652	Item 700.95 12.5%	Item 700.35 8.5%
C86/8	Carman, J. February 12, 1986	Honda Industries Inc.	84-3-00382, etc.	Items 716.10-716.29 Various rates for module portion Item 720.20, 720.24, or 720.28 Various rates for case portion Item 740.35 Various rates for watch band portion	Item 688.36 5.5%, 5.3% 5.1%
C86/9	Carman, J. February 12, 1986	Idea	67/16393-A	Item 737.30 18%	Item 685.22 12.5%
C86/10	Carman, J. February 12, 1986	Jet Sonic Corp.	84-1-00016	Item 740.35 32.4% for bands	Item 688.36 5.3%

CATION DECISIONS

HELD		
No. and rate	BASIS	PORT OF ENTRY AND MERCHANDISE
700.35 %	Agreed statement of facts	San Francisco Donner Mountain Style Nos. 156 and 157
688.36 %, 5.3%, or .1%	U.S. v. Texas Instruments, Inc., 673 F.2d 1375 (1982)	New York Electronic watches which consist of watch modules, cases and bands; an entirety
685.22 5%	U.S. v. New York Merchandise Co., 58 CCPA 53, C.A.D. 1004	Los Angeles Poodle dog radios
688.36 %	U.S. v. Texas Instruments, Inc., 673 F.2d 1375 (1982)	New York Bands; an entirety with electronic watches

C86/11	Carman, J. February 14, 1986	Lorraine's Importers	82-4-00541	Item 365.91 90% + 25% under item 766.30	Item 766. Free of the c portio old embr mats Item 365. 90% fo borde backi each value borde bakin $3.75
C86/12	Carman, J. February 12, 1986	Mattel, Inc.	80-3-00426	Item 737.22 17.5% for base stands and leg holders classified as an entirety with dolls with which they were imported	Item 774. 8.5%
C86/13	Carman, J. February 12, 1986	Zayre Corp.	83-6-00688	Item 735.06 8.6%	Item 735. Free of pursu GSP
C86/14	Aquilino, J. February 12, 1986	Gelmart Industries, Inc.	83-1-00079	Item 705.86 35%	Item 734. Free of pursu GSP

em 766.25 Free of duty for the center portion of the old embroidered mats em 365.91 90% for the borders and backings of each mat and value of borders and bakings is $3.75 each	Fisher Galleries v. U.S., 593 F. Supp. 436 (1984)	Wilmington "Old" embroidered mats
em 774.60 3.5%	Mattel, Inc. v. U.S. 8 CIT—, Slip Op. 84-133 (1984)	New York Base stands and leg holders
em 735.06 Free of duty pursuant to GSP	Agreed statement of facts	Savannah Men's gloves; product of an eligible beneficiary country
em 734.99 Free of duty pursuant to GSP	Stonewall Trading Co. v. U.S., C.D. 4023 (1970)	New York Ski gloves; product of an eligible beneficiary country

ABSTRACTED CLASSIFICATION DE

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD
				Item No. and rate	Item No. an
C86/15	Carman, J. February 18, 1986	Mattel, Inc.	84-3-00351	Items 737.22 16.8% or 16.1% for base stands and leg holders classified as an entirety with dolls with which they were imported	Item A774.5 Free of du pursuan GSP Item 774.55 8.5% for merchan importe January from the Republic China (Taiwan)
C86/16	Carman, J. February 18, 1986	Coleco Industries, Inc.	84-7-01042	Item 790.39 4.2%	Item A774.5 Free of du pursuan GSP
C86/17	Watson, J. February 19, 1986	Charley's Fishing Supply, Inc.	78-10-01832, etc.	Item 309.06 17.5%	Item 731.44 12.5%
C86/18	Carman, J. February 20, 1986	Mattel, Inc.	84-8-01164	Item 737.22 16.8% or 16.1% or Item 737.24 14.8% for base stands and leg holders classified as an entirety with dolls withwhich they were imported	Item A774.5 Free of du pursuan GSP Item 774.55 8.1% for merchan importe January March 2 1980 fro Republic China (Taiwan)

ON DECISIONS—Continued

HELD No. and rate	BASIS	PORT OF ENTRY AND MERCHANDISE
A774.55 e of duty ursuant to SSP 774.55 % for nerchandise mported in anuary, 1980 rom the epublic of hina Taiwan)	Mattel, Inc. v. U.S. 8 CIT—, Slip Op. 84-133 (1984)	New York Base stands and leg holders
A774.55 e of duty ursuant to SSP	Agreed statement of facts	New York Rigid wall and embossed wall vinyl pools
731.44 5%	Agreed statement of facts	Honolulu "SEINC" Mono (monofilament fishing) line, 1000 yards per spool
A774.55 e of duty ursuant to SSP 774.55 % for nerchandise mported from anuary 1 to Iarch 29, 980 from the epublic of hina Taiwan)	Mattel, Inc. v. U.S. 8 CIT—, Slip Op. 84-133 (1984)	New York Base stands and leg holders

C86/19	Carman, J. February 20, 1986	Panasonic Co.	84-3-00312	Item 687.43 15%, 14%, or 13.1%	Item 687 687.54
C86/20	Carman, J. February 20, 1986	Torrington Co.	81-3-00313, etc.	Item 672.20 37¢ per thousand plus 10% or 32¢ per thousand plus 9.5%	Item A67 Free o purs GSP

em 687.60 or 687.54 6%	Agreed statement of facts	Seattle Monochrome cathode ray tubes
em A672.20 Free of duty pursuant to GSP	Torrington Co., 764 F.2d 1563 (Fed. Cir. 1985)	Hartford Sewing machine needles

ABSTRACTED VALUATI

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	
V86/7	Carman, J. February 12, 1986	The De Laval Separator Co.	80-1-00166	Export value	Re
V86/8	Carman, J. February 12, 1986	The De Laval Separator Co.	80-9-01539	Export value	Re
V86/9	Carman, J. February 18, 1986	The De Laval Separator Co.	80-9-01533	Export value	Re
V86/10	Watson, J. February 19, 1986	Nipkow & Kobelt Inc.	R58/4878, etc.	Export value	F

UATION DECISIONS

	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
	Represented by invoice unit values, net packed, shown on commercial invoices with entry papers	Agreed statement of facts	Detroit Miscellaneous items
	Represented by invoice unit values, net packed, shown on commercial invoices with entry papers	Agreed statement of facts	Detroit Bulk milk coolers or farm tanks
	Represented by invoice unit values, net packed, shown on commercial invoices with entry papers	Agreed statement of facts	Buffalo Miscellaneous items
	F.O.B. unit invoice prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	New York Silk fabrics, etc.

Appeals to the U.S. Court of Appeals for the Federal Circuit

NEC Corp. v. United States, 9 CIT —, Slip Op. 86-5 (Jan. 10, 1986), *appeal docketed,* No. 86-912 (Fed. Cir. Feb. 10, 1986).

NEC Corp. v. United States, 9 CIT —, Slip Op. 85-116 (Nov. 19, 1985), *appeal docketed,* No. 86-922 (Fed. Cir. Feb. 13, 1986).

Asta Designs, Inc. v. United States, 9 CIT —, Slip Op. 86-6 (Jan. 10, 1986), *appeal docketed,* No. 86-929 (Fed. Cir. Feb. 18, 1986).

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